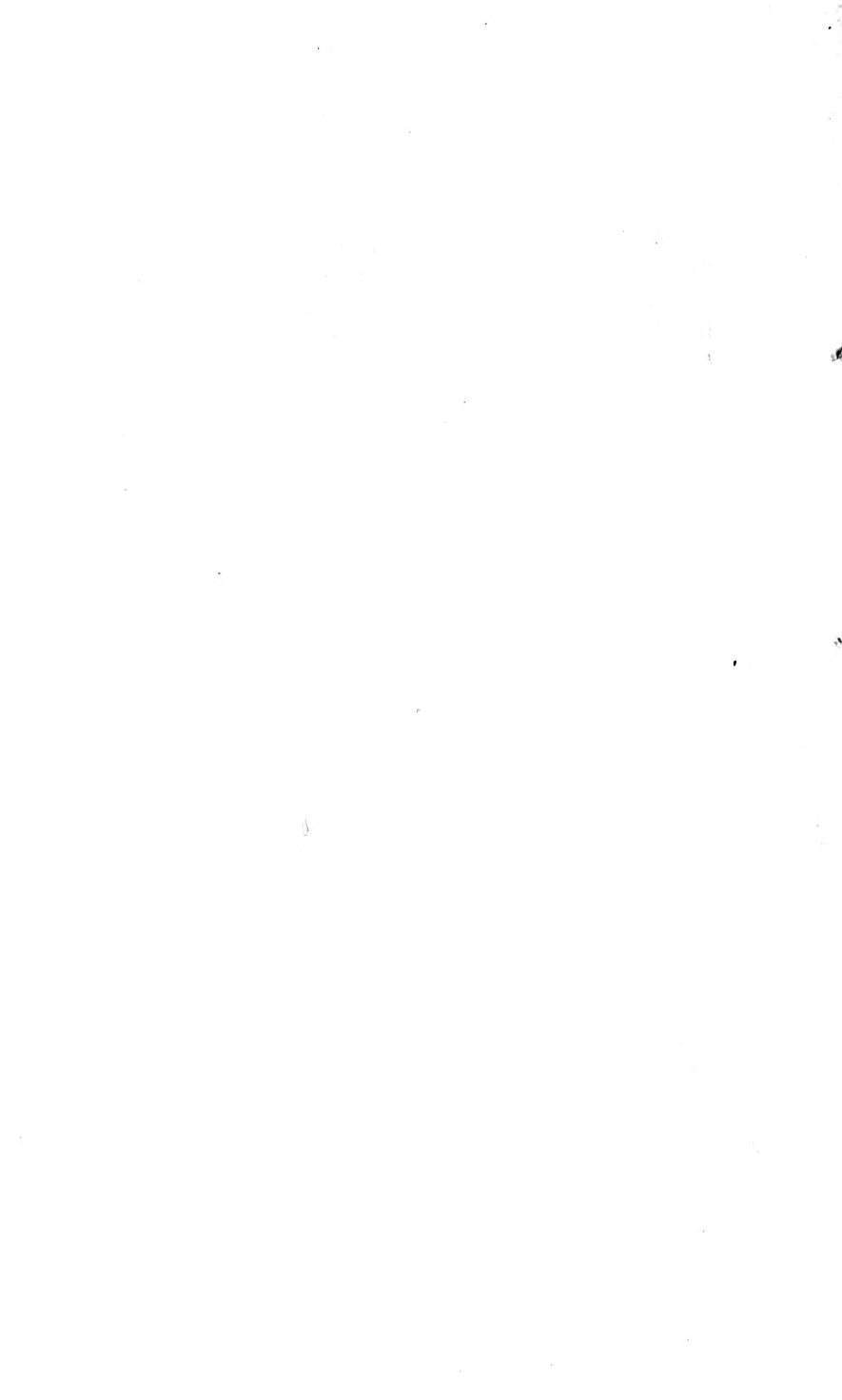




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J. G. Tallenty
REMARKS *with Mr. G.*

ON THE *the*

ROYAL SUPREMACY.

AS IT IS DEFINED BY

REASON, HISTORY, AND THE CONSTITUTION.

A LETTER

TO

THE LORD BISHOP OF LONDON,

BY

THE RIGHT HON. W. E. GLADSTONE,

M.P. FOR THE UNIVERSITY OF OXFORD.

LONDON:

JOHN MURRAY, ALBEMARLE STREET.

1850.

Hawarden. Aug. 23. 1852.

REMARKS

ON

THE ROYAL SUPREMACY.

MY LORD BISHOP,


THE residents in your Lordship's diocese need, I hope, make no apology, unless it be yourself, for laying before you at this great and unexampled crisis in the history of the Reformed Church of England, either their apprehensions from the dangers that surround her, or their suggestions in regard to the means of relief. Your paternal office affords me this first and chiefest reason for addressing you, and renders it needless to dwell upon your signal and unmeasured labours in its discharge as a second.

The ferment of the present hour, my Lord, has set many minds and pens in motion. But it is not excitement only with which you have to deal. Many of those persons in the Church, if I am not mistaken, who are the least excited, are likewise the most profoundly moved. Besides the vehement and sudden emotion of such periods as this, they minister food to the slower and more inward, the more permanent and profound processes of the mind. If solicitude may well be felt on account of those whom the storm at once dislodges as leaves that were half ready of themselves to fall, much more should it be wakened if we find that the fond and affectionate, the resolved and tranquil, children of the Church have arrived, or are arriving, at the conviction that she is in near peril of the forfeiture of her solemn trust, and that the providence of God, which has hitherto so wonderfully kept her, makes now the most urgent calls upon the courage and sagacity of all who,

whether as rulers or subjects, and whether in the State or in the Church, have an interest and a share in the determination of her destinies.

Your Lordship knows, I doubt not, how many minds, not usually given to violence or precipitancy, are entirely convinced that the principles of the report or recommendation of the Judicial Committee in the case of *Gorham versus* the Bishop of Exeter, are fatal, in the first instance, to an article of the Christian faith, and in their indirect, but, as they believe, certain results, to all fixed dogmatic teaching whatsoever ; as well as to the office and vitality of the Church, which depends upon that teaching, and to its national establishment, which would not long survive, under the circumstances of the day, its surrender of its higher charter.

I shall not, on the present occasion, enter upon any scrutiny of these propositions, because it would lead me into great length, and is not necessary for the purpose which I have in hand. Nor shall I inquire whether it be really true, or, on the other hand, egregiously false, that the opinions stated in Mr. Gorham's book are those which have always been tolerated, if they have had no direct sanction, in the Church of England ; or, that they are in substance the opinions of a large number of her clergy at the present day ; or, that there is a general satisfaction with the result of the proceedings (assuming that they have reached their final result). For with the state of law which has led to that result no one pretends that there is a general satisfaction. No one pretends, that the constitution of the Judicial Committee of Privy Council is adapted to the due and solemn decision of cases of doctrine. Before the decision in the *Gorham* case was delivered, and when no man had an interest in upholding unduly the credit of the court, there was but one voice of reclamation throughout the country against the gross indecency of such a mode of provision for such causes. And even now, when the case is much altered in that respect, there is still a nearly universal acknowledgment, that the law requires material alteration. It is enough for me to stand upon this acknowledgment ; and upon the further fact, that so many persons of the greatest weight, from the episcopal bench downwards, will find themselves precluded in conscience from acquiescence at any time, or under any circumstances, in the law as it now is, because



they are convinced that it is a state of law which has already led to the violation, and would ultimately lead to the destruction, of the faith and work of the Church.

Your Lordship has perhaps also been apprised, that among the evil fruits of the recent proceedings, has been the avowal, which they have drawn from some quarters, of an opinion that the English Church is now reaping as she has sown: that the constitution of the Appellate tribunal is conformable to the principles established at the Reformation for governing the relations between the Church and the State: that the Royal Supremacy, as it was then declared or defined, involved a surrender of the birthright of the Church, and that unless by its destruction she cannot be saved.

These opinions coincide, for the immediate and practical purposes before us, with others that proceed from opposite points of the compass. They are the opinions which, very naturally and consistently, Roman Catholic writers among us have laboured, and now with heightened hopes are labouring, to propagate; which for the moment are attractive to such persons, as approve of the late Report on its merits; which have always found a good deal of favour with a particular political party; and which, it must be added, are eminently acceptable to the spirit of the world, and the spirit of the age, in so far as these are in conflict with the spirit of Faith, and of the great institution which was appointed for the propagation and support of that spirit.

It has, therefore, become vital to many that they should ascertain whether they are really placed in so grievous a dilemma, as that either they must condemn the reformation of the Church of England as involving a traitorous abandonment of her trust, and therefore quit her communion; or else they must accept a system under which, while the legislative organs of the Church are in abeyance, her laws are to be judicially construed and applied, even in the very highest and most solemn subject matter, by a Court essentially temporal and civil, and a Court which, as they conceive, has already, on the very first occasion of its reversing a sentence of the ecclesiastical judge, made practically null one article of the Christian faith, and established principles that must involve the nullification in due time of the rest.

This inquiry, my Lord, is indeed of vital moment to those who,

loving the Church-Establishment of England, and unwilling to disentangle elements, which have long and on the whole beneficially cohered, yet must, when they are put to it, not scruple to declare that they love the Church first and the Establishment second, and that there cannot be a moment's hesitation in the choice between them; or who, loyal in heart to the Reformed Church of England, yet place the Church first and the redress of abuses in it second, as every good citizen must revere the British constitution itself more than any particular Statute, however grave, however wise, however restorative.

And, vital to these, the inquiry is important at least, if not vital, to all who, with less defined ideas, or even with different estimates of the relative values of the several elements of the case, are nevertheless desirous so to frame their course, as to relieve consciences and to promote peace, and who would gladly find that they could best attain their ends by adhering, or by returning, as the case may be, to the principles declared at the Reformation in regard to the relation of Church and State.

My Lord, I for one am deeply convinced that it is requisite for the Church, while she continues in possession of her temporal honours and emoluments, to make every effort compatible with her first necessities to disarm even groundless jealousies on the part of the civil power; not to vaunt in braggart words her readiness to abandon her legal privileges rather than her faith, until she actually sees that the hour, appointed for her to make that choice, is at hand; and to observe the utmost care, that in all demands which she may make upon the State for legislative relief, she takes her stand, as to all matters of principle or of substance, upon the firm ground of history and law.

The questions then that I seek to examine will be as follows:—

1. Did the Statutes of the Reformation involve the abandonment of the duty of the Church to be the guardian of her Faith?
2. Is the present composition of the Appellate tribunal conformable either to reason or to the Statutes of the Reformation, and the spirit of the Constitution as expressed in them?
3. Is the Royal Supremacy, according to the Constitution, any bar to the adjustment of the Appellate jurisdiction in such a manner as that it shall convey the sense of the Church in questions of doctrine?

All these questions I humbly propose to answer in the negative, and so to answer them in conformity with what I understand to be the principles of our history and law. My endeavour will be to show that the powers of the State so determined, in regard to the legislative office of the Church, (setting aside for the moment any question as to the right of assent in the laity,) are powers of restraint; that the jurisdictions united and annexed to the Crown are corrective jurisdictions; and that their exercise is subject to the general maxim, that the laws ecclesiastical are to be administered by ecclesiastical judges.

If the reply be a correct one, my intrusion upon your Lordship's time may be excused. If the main propositions are overruled by opposite authority and evidence, I shall retire from the contest with earnest desires, but with the faintest hopes, that any means may yet be discovered of prolonging the existence of the national Establishment of religion without violating the integrity of the Christian Faith, polluting the conscience of the Church as its appointed witness, and destroying alike its authority and its capacity for a due discharge of its work. In the mean time I contest the propositions of the writers to whom I have referred with an unshrinking confidence, in the name and in the interest, as it seems to me, not less of the State than of the Church; being persuaded that their view proceeds upon a misapprehension of our religious history, and a fundamental and entire misapprehension of the Constitution of this country. I find myself neither bound nor authorised to deliver over to anathema the memories of our forefathers in the Church, who are alleged to have transacted this gigantic simony, this barter of the work of the Holy Ghost for the trappings of power and the lucre of an evil world, for the lust of the eye and the pride of life. I shall contend that, amidst the great alarms, and the yet greater dangers, of this emergency, we require nothing more than a wise and manly moderation on the part of our temporal rulers; nothing more—or, rather, something less—than a frank adoption of the constitutional principles of the Reformation, I will not say to heal and close the divisions which the recent proceeding has both disclosed and also frightfully aggravated, but to put them in the way of the only treatment which can either relieve consciences now most grievously

oppressed, or secure to the Church the degree of peace necessary for the avoidance of perpetual scandal, and for the discharge, even the partial discharge, of her sacred function.

Let us, then, my Lord, first briefly sum up the concessions made by the Church, and the main statutory enactments of the era of the Reformation respecting her, whether founded on her concessions or not; and afterwards review in general outline those conditions which, growing out of the nature of the State and of the Church respectively, seem to be indispensable to their full co-operation under all circumstances, and even to their peaceable neighbourship, except under the circumstances which I shall afterwards describe. With these preliminaries, we shall be in a condition to attempt an estimate of the real meaning and the real merits of the great legislative provisions of the Reformation relating to Church power.

First then, both houses of the clergy in Convocation acknowledged the King, in the year 1530, as being lord and head over the Church, in these terms: *Ecclesiæ et cleri Anglicani singularem protectorem, unicum et supremum dominum, et, quantum per Christi legem licet, etiam supremum caput ipsius majestatem recognoscimus*.*

I do not enter into the question† whether the qualifying words *quantum per Christi legem licet* were finally omitted by the Convocation, but simply follow the received opinion. In the Statute,‡ however, though passed “for corroboration and confirmation thereof,” that is, of the submission, there is no notice of them.

Secondly, the Clergy acknowledged that the Convocation always had assembled, and ought only to assemble, by the King’s writ.

It is not required to dwell upon this point: first, because it purports merely to be an acknowledgment of existing practice; secondly, because the question whether Convocation were to

* Collier, ix. 94. In immediate connection with the words are the thanks of the Convocation to Henry for his services to the Church, against *quampulrimos hostes, maxime Lutheranos*.

† See Parker, *Antiq. Eccl. Brit.*, p. 487.

‡ 26 Henry VIII., c. 1.

assemble otherwise than by the King's writ, was a secondary one when the Church had likewise the power to legislate in synods which were undoubtedly assembled without any such writ; and lastly, because the really effective restraint was that conceded by the promise of the clergy, which, it will be seen, was applicable, not to any particular form of meeting, but bound the whole Spiritual Estate, without distinguishing any one mode of formal action from another.

Thirdly, they promised *in verbo sacerdotii*, according to the recital in 25 Hen. VIII. c. 19, never thenceforward "to attempt, allege, claim, or put in ure" any new canons but with the king's licence.

Fourthly, that they never would "enact, promulge, or execute" any such canons without his assent.

Fifthly, they petition that a Commission may be appointed by the Crown, to consist of thirty-two persons—sixteen to be of the clergy and sixteen to be laymen of the two Houses of Parliament—to review the Church laws then subsisting; to abolish and annul such part of them as they might think exceptionable; and to present such of them as they might consider worthy to stand to the Crown for fresh confirmation.*

The powers thus proposed to be delegated were vast; they did not, however, include any right to pass or to propose any new matter for ecclesiastical law. The ground of the proceeding was recited to be, that there were at the time, as no doubt was true, many decretals and constitutions that were contrary to law, and onerous to the subject as well as the King.†

Nor is it necessary to discuss the wisdom or propriety of this petition of the clergy, since the enactments passed in consequence of it never took final effect; and, however material they may be as illustrating the spirit and tendencies of the day, they have not in any direct manner entered into the constitution of the English Church.

By these recitals we plainly see what were the concessions of

* The persons actually appointed under Edward VI. may be found in Collier, App. No. LXI. They were seventeen of the clergy, with eight lawyers and six civilians.

† 25 Henry VIII. c. 19.

the spiritual estate of the realm in regard to the power of legislation for the Church. There was no surrender of that power : no acknowledgment that the source of it resided in the Crown : but the exercise of it was placed under restraints perfectly effective, as it was made dependent on the Royal licence or assent, both as to the power of deliberation, and as to the power of giving effect to its results.

Accordingly, both the theory and practice of the State have recognised the legislative power of the Church to be in Convocation. The formularies of the Church as they subsist were adjusted by it, and received the sanction of the Legislature. The latest declaration on the subject is perhaps the clearest : that, namely, of 1689, by a joint address from both houses of Parliament, praying, "that according to the ancient practice and usage of this kingdom in time of Parliament, His Majesty would be graciously pleased to issue forth his writs, as soon as conveniently might be, for calling a Convocation of the clergy of this kingdom, to be advised with in ecclesiastical matters."*

It is not, however, so clear what the Convocation either augured or intended with respect to executive and judicial power, in making these concessions. An acknowledgment of the headship of the Crown, qualified by the law of Christ, by no means appears *ex vi terminorum* to imply the annexation to it of a supreme jurisdiction in all ecclesiastical causes. And although we find in the submission the words, "*singularem protectorem unicum et supremum dominum*," the framers of the statute have not thought it worth their while to recite these words or to found any construction upon them. Again, the acknowledgment of the King as head of the Church is recited as absolute, contrary as it appears to the facts ; and the enacting part of the statute is not confined to providing that the King shall be reputed its head, and shall have all the jurisdictions and authorities appertaining to that title, but it goes on to make a separate provision, that the Crown shall have full power and authority to correct all errors, heresies, and offences whatsoever, "which by any manner spiritual authority or jurisdiction ought or may lawfully be reformed, repressed, ordered, re-

* Cardwell's Synodalia, Pref., p. xxi. Parl. Hist., v. p. 216.

dressed, corrected, restrained, or amended." In these words all corrective jurisdiction whatever was definitely annexed to the Crown, while the privileges appertaining to headship were left quite undefined. The effect of the statute, therefore, seems to be, that while *corrective* jurisdiction was secured in legal language to the temporal power, there was no distinct provision whatever made with respect to *directive* jurisdiction, that is to say, the ordinary authority by which the functions of the Church, when unobstructed by offence or dispute, are discharged.

I have referred in detail to the statute of the 26th Henry VIII., because of the importance of its subject matter and the reference to it in subsequent statutes, and because it is sometimes alleged to be still in force.* This allegation, however, appears to be quite erroneous. The note on the Act in the Statutes at large directs our attention to the circumstances that the Act was repealed by the 1 & 2 Phil. and M., c. 8 ; and that, when the repealing Act was itself repealed, the repealing parts of it were saved, in the 1 Eliz., c. 1, except as to certain of the rescinded Acts therein particularised, among which this is not contained. (See 1 Eliz., c. 1, sections 2—13.)

The enacting parts of the 1st of Elizabeth make no reference to the consent of the clergy.

We must then refer to further proceedings to ascertain within what limits the clergy recognised a lawful power, other than legislative, in the Crown, for ecclesiastical purposes.

The Thirty-seventh Article, adopted by the Convocation in 1562, but belonging to the number of those which do not appear to be included in the Act of 1570, (which requires the subscription of the clergy), declares as follows :—

"The Queen's Majesty hath the chief power in this realm of England, and other her dominions ; unto whom the chief government of all estates of this realm whether they be ecclesiastical or civil in all causes doth appertain, and is not, nor ought to be, subject to any foreign jurisdiction."

The canons of 1604 went farther ; for they bound the clergy to maintain and cause to be maintained all that the civil power had

* Stephens's Eccles. Statutes, p. 177 n.

done in regard to the supremacy. It is provided in the first of these canons, that they

—“shall faithfully keep and observe, and (as much as in them lieth) shall cause to be observed and kept of others, all and singular laws and statutes, made for restoring to the Crown of this kingdom the ancient jurisdiction over the State Ecclesiastical, and abolishing of all foreign power repugnant to the same.”

And by the second, excommunication is decreed against those who shall affirm that the King hath not the same authority in causes ecclesiastical that the godly Jewish kings and Christian emperors enjoyed ; or shall

—“impeach any part of his regal supremacy in the said causes restored to the Crown, and by the laws of this realm therein established.”

In 1640 canons were passed, which were equally complete with those of 1604 as Synodical Acts, and which like them received the Royal assent, though they have never obtained the force of law. In the first of these, the supremacy is defined as attaching to the office of King generally rather than to that of the King of England in particular ; and among other matter we find the following explanatory clause :—

“For any person or persons to set up, maintain, or avow, in any their said realms or territories respectively, under any pretence whatsoever, any independent *coactive* power, either papal or popular, (whether directly or indirectly,) is to undermine their great royal office, and cunningly to overthrow that most sacred ordinance which God himself hath established ; and so is treasonable against God as well as against the King.”

Upon the whole it seems very evident that the statutory settlement, at the Reformation, of the ecclesiastical jurisdiction of the Crown was in part founded upon the anterior proceedings of the Church, and as to the rest accepted by her subsequently ; and that she is fully and absolutely responsible for it in the most determinate manner ; and not merely in the less determinate, though equally real, manner, in which she may become responsible, through continued and general acquiescence, for measures to which she has never directly been a party.

The provisions, then, of the temporal law, for which the Church

thus became answerable by the direct and formal adoption of them, appear to have been as follows.

We pass by the 26 Henry VIII., because, as we have seen, it was not in force at any period after the reign of Mary.

The 1st of Elizabeth, c. 1 (section 17), provided "that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever, by authority of this present parliament, be united and annexed to the imperial crown of this realm."

And in the nineteenth section it provides that (among others) all bishops and ecclesiastical persons shall take the oath of the Queen's supremacy, which commences with the following clause:—

"I, A. B., do utterly testify and declare in my conscience that the Queen's Highness is the only supreme governor of this realm, and of all other Her Highness's dominions and countries, as well in all spiritual and ecclesiastical things or causes, as temporal."

But it is important to observe that the words which I have quoted no longer find place in the oath, as they were struck out of it when it was remodelled in the 1 G. & M., c. 8. The main operative enactment, therefore, to which the Church now stands bound by the terms of the canon is that of 1 Eliz., c. 1, sec. 17, uniting and annexing all lawful spiritual jurisdictions to the Crown. The present oath of supremacy merely repudiates the Papal supremacy, though in terms which, relatively to the present state of the law, are open to exception.

The clergy, however, at ordination and institution, subscribe to a clause in the thirty-sixth canon containing words similar to those of the oath of Elizabeth.

We have now before us the terms of the great statute which, from the time it was passed, has been the actual basis of the royal authority in matters ecclesiastical: and I do not load these pages by reference to declarations of the Crown, and other public documents less in authority than this, in order that we may fix our view the more closely upon the expressions of what may fairly be

termed a fundamental law in relation to the subject-matter before us.

The first observation I make is this: there is no evidence in the words which have been quoted that the Sovereign is, according to the intention of the statute, the source or fountain-head of ecclesiastical jurisdiction. They have no trace of such a meaning, in so far as it exceeds (and it does exceed) the proposition, that this jurisdiction has been by law united or annexed to the Crown.

I do not now ask what have been the glosses of lawyers—what are the reproaches of polemical writers—or even what attributes may be ascribed to prerogative, independent of statute, and therefore applicable to the Church before as well as after the Reformation. I must for the purposes of this argument assume what I shall never cease to believe until the contrary conclusion is demonstrated by fact, namely, that in the case of the Church justice is to be administered from the English bench upon the same principles as in all other cases—that our judges, or our judicial committees, are not to be our legislators—and that the statutes of the realm, as they are above the sacred majesty of the Queen, so are likewise above their ministerial interpreters. It was by statute that the changes in the position of the Church at that great epoch were measured—by statute that the position itself is defined; and the statute, I say, contains no trace of such a meaning as that the Crown either originally was the source and spring of ecclesiastical jurisdiction, or was to become such in virtue of the annexation to it of the powers recited; but simply bears the meaning, that it was to be master over its administration.

The powers given are corrective, not directive or motive powers—powers for the reparation of defect and the reform of abuse, but not powers on which the ordinary, legitimate, and regular administration of the offices of the Church in any way depends for its original and proper sanction.

Is this a mere refinement, or is it a valid and important distinction? Is the authority entitled to redress evils in a given relation of life, or incorporation of men, of necessity that on which the regular discharge of the duties of that relation, the proper obligations attaching to membership in that society, depend?

The answer to this question will, I think, be found to depend

on an anterior one, namely this, whether the given relation in life, or the given society, is one constituted by the State, or co-ordinate with (or anterior to) it. In the former case the hand of the State, by its own strength, imparts to the machine its movements ; in the other it stands by, and only tempers, when need has arisen, the operation of an independent agency. Of an army, the State is the creative power, and as much directs what ought to be done as corrects what ought not to be done. On the other hand, the State did not create the family, yet it regulates, with a breadth of range that it rests only with itself to define, the relations of its members, yet subject to this great distinction, that whatever interference, as between man and wife, or as between child and parent, it may exercise, is always on the ground of faults committed or defects that have occurred, never to teach duty. The whole office of correction is not a normal office, but it is, as administered by man, an expedient ; the best that the case admits of ; a choice of the lesser evil ; and it would be thought ridiculous to hold that the duties of kin were derived from the law of the land, for this reason, that the family is in fact anterior to the State, and independent of it, and has its duties marked out by the hand of God. But every one of these propositions is, as matter of historical truth, if we believe in the New Testament, no less incontestable concerning the Church, than it is concerning the family.

I say, therefore, it does not appertain to the State, by the nature of things, to be the origin of ecclesiastical jurisdiction. If not, then, by the nature of things, has such an attribute come to it by compact ? I answer, no : the compact of the Church and the State in regard to their constitutional relations is well defined by statutes founded on the prior or posterior consent of the clergy, and themselves conveying the consent of the laity ; and the compact contains no such condition.

But another question remains : Has such a claim been *de facto* made and exercised by the State, say on the ground of prerogative or on any other ground, and is it actually our law, sanctioned on all hands by acquiescence and by use for a long tract of time ?

I answer, no. There was indeed such a claim, and such an exercise of it, in the reigns of Henry VIII. and Edward VI. ; more or less of it certainly must have been involved in the vicar-

generalship of Cromwell, and in the episcopal commissions of both those reigns ; for although those commissions only purported to confer on the prelates receiving them powers *præter et ultra* what had been imparted to them by Holy Scripture, yet they were powers on which the whole exercise of the office was immediately dependent, as was plain from the terms in which they were conveyed. The claim itself is palpable even in the letter of the proceedings of the reign of Edward VI., for in the *Reformatio Legum* it is declared respecting the king as follows :—*Omnis jurisdictio, et ecclesiastica et secularis, ab eo tanquam ex uno et eodem fonte derivantur.**

Similar language may be found in the episcopal commissions, and in Statutes of this reign. But the Statutes were repealed, and remain so : the *Reformatio Legum* never gained the force of law : and with those commissions we have nothing whatever to do. The issue of them was an extravagant stretch of the power supposed to be latent in the admission of the royal headship. They were first issued by Henry, and after the demise of Edward VI. we hear of them no more. They were never issued by law : and the headship, of which the power to issue them may have been supposed an attribute, has itself, after subsisting for twenty-five years, been extinct for two hundred and ninety-six, as far as the statute book is concerned.

Whatever inference might be drawn from the use of the word Head is more than destroyed by the marked transition to the term Governor ; and the idea which that term conveys is of a negative, not a positive character ; it is that of a power which corrects, but does not actuate.

I have read with some surprise and much grief, in the work† of a clergyman of great ability and of undoubted theological learning, the assertion that in the time of Henry VIII. the See of Rome was both “the source and centre of ecclesiastical jurisdiction,” and therefore the supreme judge of doctrine ; and that this power of the Pope was transferred in its entirety to the Crown.

* Stephens’s Eccles. Stat., p. 406. Similar expressions may be found in the reign of Henry VIII. See Collier, App. No. XLI.

† The Royal Supremacy viewed in reference to the two Spiritual Powers of Order and Jurisdiction. By T. W. Allies, M.A., Rector of Launton, Oxon.

I will not ask whether the Pope was indeed at that time the supreme judge of doctrine : it is enough for me that not very long before the Council of Constance had solemnly said otherwise, in words which, though they may be forgotten, cannot be annulled.

That the Pope was the source of ecclesiastical jurisdiction in the English Church before the Reformation is an assertion of the gravest import, which ought not to have been thus taken for granted. It is one which I firmly believe to be false in history, false in law—which in my view, as an Englishman, is degrading to the nation, and, as a Christian, to the Church. This is simply to make the Pope universal bishop. But even Gratian, with his false Decretals which magnified so enormously the Papal power, denies this office to the Pope in the following words, as cited by Van Espen : “ *Universalis autem (episcopus) nec etiam Romanus pontifex appellatur.*”* As to Van Espen’s own judgment, it is almost needless to refer to particular passages. But again I go back to the Decretals, which themselves, as cited by him, declare that all the Apostles were sharers with St. Peter in the same honour and power : “ *Cæteri vero Apostoli cum eodem pari consortio honorem et potestatem acceperunt.*”† The fact really is this : a modern opinion, which by force of modern circumstances has of late gained great favour in the Church of Rome, is here dated back and fastened upon ages to whose fixed principles it was unknown and alien ; and the case of the Church of England is truly hard when the Papal authority of the Middle Ages is exaggerated far beyond its real and historical scope, with the effect only of fastening that visionary exaggeration, through the medium of another fictitious notion of wholesale transfer of the Papal privileges to the Crown, upon us, as the true and legal measure of the royal supremacy.

It appears to me that he who alleges in the gross that the Papal prerogatives were carried over to the Crown at the Reformation, greatly belies the laws and the people of that era. Their unvarying doctrine was, that they were restoring the ancient regal jurisdiction, and abolishing one that had been usurped.

* Van Espen, Comment. in primam partem Gratiani Dist. 99.

† Van Espen, Jus Eccles., Part I. tit. xvi. cap. 2.

But there is no evidence to show that these were identical in themselves, or co-extensive in their range. In some respects the Crown obtained at that period more than the Pope had ever had ; for I am not aware that the Convocation required his licence to deliberate upon canons, or his assent to their promulgation. In other respects the Crown acquired less ; for not the Crown, but the Archbishop of Canterbury was appointed to exercise the power of dispensation in things lawful,* and to confirm episcopal elections. Neither the Crown nor the Archbishop succeeded to such Papal prerogatives as were contrary to the law of the land ; for neither the 26th of Henry VIII. nor the 2nd of Elizabeth annexed to the Crown all the powers of correction and reformation which had been actually claimed by the Pope, but only such “as hath heretofore been or may *lawfully* be exercised or used.”† But what was contrary to statute or to prerogative the Bishop of Rome could not lawfully do ; and therefore, whatever he had done of this kind, the power to do was not annexed to the Crown by the Act. Nay, more, the title of the Act itself, which generally limits and bounds the force of the contents, and which describes in the clearest manner the intention of the Legislature, is not “an Act for annexing to the Crown the powers heretofore claimed or used by the See of Rome,” but “an Act to restore to the Crown the ancient jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign powers repugnant to the same.” The “ancient jurisdiction,” and not the then recently claimed or exercised powers, was the measure and the substance of what the Crown received from the Legislature : and, with those ancient rights for his rule, no impartial man would say, that the Crown was the source of ecclesiastical jurisdiction according to the statutes of the Reformation. But the statutes of the Reformation era relating to jurisdiction, having as statutes the assent of the laity, and accepted by the canons of the clergy, are the standard to which the Church has bound herself as a religious society to conform.

This principle of return to the ancient jurisdiction received in

* 25 Hen. VIII., c. 21, sect. 3-6.

† 1 Eliz., c. 1, sect. xvi. The words in 26 Hen. VIII., c. 1, are certainly not larger.

the reign of Elizabeth a very special sanction. With the Queen's injunctions of 1559 there was an Admonition declaring it to be the meaning of the oath of supremacy that the Queen should have "sovereignty and rule over all manner of persons," "so as no other foreign power" should "have any authority over them." This was declared to be the ancient jurisdiction of the Crown, and the jurisdiction claimed by Henry VIII. and Edward VI.: and the statute 5 Eliz. c. 1 (sect. 14) refers to the Admonition as fixing the legal construction of the oath, and limiting the obligation contracted by it.

At the same time there are cases on record in which the royal jurisdiction was asserted for the supply of defects, so as to go beyond the general definition of a simply corrective power. Such were the suspensions of Archbishop Grindal and Archbishop Abbot. Of these suspensions I shall only say that I apprehend much stronger instances might be found of interference by sovereigns to defend the Church against her own official rulers, which have been always considered just and laudable under peculiar circumstances, however undesirable as a general rule; and that the purpose in these cases undoubtedly was so to defend it, and to prevent its laws from being undermined and its system sapped by a latitudinarian spirit enthroned in its primatial chair. The absolution of Archbishop Abbot from the canonical incapacity incurred by his having killed a man by accident, has been named as a signal instance of the height to which the supremacy was carried, but to me it appears a case so purely of the exterior forum as hardly to touch the question; and the instrument of dispensation itself bears the most distinct testimony to the fact that his character as a Bishop, and not the decree of the Crown, was regarded as the source of his authority: it was a commission to Bishops, issued on the prayer of the Archbishop: it declared itself to be issued *ad cautelam et ex superabundanti, ad abundantiore cautelam, ad majorem cautelam*: and its purpose is "*ut in susceptis ordinibus et jurisdictionibus secundum concreditam sibi ratione ordinis et archiepiscopatus sui potestatem liberè ministrare valeat*."* But besides the executive acts of suspension

* Collier, ix, 376.

above named, we have another remarkable fact, a favourite one with Roman Catholic controversialists, in the Statute 8 Eliz. c. 1, which relates to the consecrations of the first bishops of that reign.

As to this Act of Parliament I would observe, in the first place, that it carefully avoids pretending to confer *proprio vigore* the episcopal character or power. It is entitled “An Act *declaring* the making and consecrating of the archbishops and bishops of this realm to be good, lawful, and perfect.” The doubts or questions which it recites in the preamble, are on the point “whether the same were and be duly and orderly done *according to the law* or not :” * the remedy is partly to *show* that it has been “duly and orderly done, according to the laws of this realm ;” and partly “to provide for the more surety thereof.” It appears that Bishop Bonner had alleged that the Ordinal, repealed along with the Prayer Book in the reign of Mary, had not been separately named in the reviving Statute 1 Eliz. c. 2. † The objection seems to have been frivolous, since neither was it expressly named in the Statute of repeal. And the true meaning to be assigned to the Act appears to be this : that it was passed *ex majori cautelâ*, not because the doubts entertained were supported by any strength of reasoning, but because the consecration of the Bishops was the corner-stone of the ecclesiastical order, and it was therefore thought necessary to give it all the support and sanction which it could derive as matter of law from the most express and detailed provisions.

Let us however suppose, as may be the case, that the Act had a wider purpose than merely to meet this technical cavil on the wording of the Statutes ; that it contemplated, and sought to meet, the whole of the objections urged by the partisans of the Roman See against the consecration of Parker in regard to mission and jurisdiction. Does it in this point of view sustain any such inference as that the Church of England denies the existence “of any special power to govern the Church beyond that which is in the civil magistrate ?” ‡ Be it observed all along, the question is not whether the Statutes of the Reformation affirmed anew that which, according to the laws of the Church, was already sufficiently

* Preamble, 8 Eliz. c. 1.

† Gibson’s Codex, p. 100.

‡ Allies, p. 61.

affirmed for ecclesiastical purposes alone ; but whether in making such affirmation they denied either directly or by implication that the matter in hand might have a distinct spiritual basis independent of secular legislation.

We will assume, then, that the Statute intended to exclude and put to silence all objections, to include in its purview all the circumstances of the consecration of Parker, and to assert the validity of his mission and jurisdiction. Now this I allege might be done, with perfect consistency, by those who were most firmly convinced that, for spiritual purposes, all these were already valid ; because upon that validity depended not spiritual acts only, but a great number of secular, and perhaps a yet greater number of mixed transactions, appertaining to bishops, and utterly incapable of deriving validity from theological argument, or from any source whatever except the law of the land. Suppose, for instance, that a tenant of the See of Canterbury had refused to pay rent to Parker under a lease, on the ground that he was not a lawful incumbent. The very best treatise, that a Courayer could have written to show that Parker had mission and jurisdiction in the sense of the Church, would not have availed him ; nothing but a statute would have redressed the wrong ; and it was therefore reasonable to pass a statute for the purpose. And if its general aim did not disparage the inherent faculties of the Church, neither did its language ; for both in title and in preamble, as I have shown, it confined itself to legal regularity ; and in the enacting clause touching the bishops and clergy concerned, the provision is really worded with the utmost care, so as to avoid the supposition of a pretension to give spiritual power ; it being this : that the said bishops and clergy

“Be in very deed, and *also* by authority hereof declared and enacted to be, and shall be, archbishops, bishops, priests, ministers, and deacons, and rightly made, ordered, and consecrated.”

Had the intention been confined to clearing up a doubtful point of statute law, the enactment would simply have declared these persons to be bishops and clergy respectively : there was no room for a distinction between what they “be in very deed” and what they are to be “declared and enacted to be ;” but the distinction is marked in the strongest manner by the word “also ;” and in

truth, while they were recited to be bishops of the Church simply, they were declared and enacted to be bishops of the Church according to the laws having force within the realm.

Nor will it avail to say that the Legislature herein recognised only what is called the power of order as inhering in the Church, and not jurisdiction. For the exercise of the power of order, or the conveyance of the episcopal character, is itself an act of jurisdiction: the whole question in doubt in this case was, whether its exercise had been good, as to certain particular instances, in the eye of the law. It was expressly affirmed by the words which I have cited to be valid in very deed as to the conveyance of the episcopal character, apart from the enactment declaring and constituting it valid for the purposes of law, which is only to say, in other words, that the exercise of jurisdiction was averred to be valid for spiritual purposes apart from the sanction of the Legislature.

To sum up the whole, then, I contend that the Crown did not claim by statute, either to be of right, or to become by convention, the *source* of that kind of action, which was committed by the Saviour to the Apostolic Church, whether for the enactment of laws or for the administration of its discipline: but the claim was, that all the canons of the Church, and all its judicial proceedings, inasmuch as they were to form parts respectively of the laws and of the legal administration of justice in the kingdom, should run only with the assent and sanction of the Crown. They were to carry with them a double force—a force of coercion, visible and palpable—a force addressed to conscience, neither visible nor palpable, and in its nature only capable of being inwardly appreciated. Was it then unreasonable that they should bear outwardly the tokens of that power to which they were to be indebted for their outward observance, and should work only within by that wholly different influence that governs the kingdom which is not of this world, and flows immediately from its King?

But while I am unable to find in the laws or principles of the Reformation, as it was settled among us, any acknowledgment that the Crown is the source of ecclesiastical and spiritual jurisdiction, I will go a step further and say, that although this is not language which could be legitimate and safe in the mouth of the Church, it is neither unintelligible nor of necessity intolerable as the language of law and of its professors.

Whether the Church can exist in security and work in peace by the side of a system of law framed on such a principle, or, which I take to have been our case, where the members of the legal profession have favoured the attachment of such a sense to laws not requiring and in strictness not properly admitting it, is a question of vital importance, but one, as far as appears to me, to be determined according to times and circumstances carefully considered, and not by hasty inferences from abstract principle.

Holding, then, by the proposition, that the Church cannot be made responsible for glosses put upon the law to her prejudice, and for the professional traditions which may influence the courts, but of which she cannot minutely follow the rise, and against which she has no means of contending till a crisis is brought about ; but that she is properly and morally responsible only for those statutes in their plain meaning which she has formally accepted, or else made her own by evident, general, and continued acquiescence—I should wish also and earnestly to represent how much is to be said on behalf of the royal supremacy, even as it is commonly understood by that profession, which has always been jealous, and within certain limits legitimately jealous, of ecclesiastical power. Even if we superadd to the restraints imposed by law upon the legislative power of the Church the doctrine that the Crown is the fountain of ecclesiastical and spiritual jurisdiction : even if we allow this, for argument's sake, as a true description of the legal relation to the Crown which the Reformed Church has inherited, still I say, do not let the men of this day be too hasty in consigning the memory of their forefathers to condemnation and disgrace, but let us consider whether, even under these hard and untrue conditions, it can be pleaded against the Church of England that she has made over her spiritual trust to a secular power, and sold herself for gold.

Strong, indeed, are the general reasons, applicable to the state of society which has until recently prevailed, for a close amalgamation between ecclesiastical and civil authority. They are founded in human nature, and in the nature of the societies which are the depositaries of each power respectively. They are painfully illustrated by the convulsive struggles arising out of those collisions that history records.

We have been thus far on the question of fact, what the actual constitution was. We come now to the question of right, how far

it was accordant with the nature and obligations of the bodies concerned.

The temporal aspects of the life of man have ever been, and must always be, in the closest relations with the spiritual. Before the advent of our Lord the system now called Erastian prevailed : it has all the authority of Pagan precedent. Creed, priesthood, ritual, all that constituted the religion of the masses of mankind, were in a subjection to the state, only qualified by such advantage as the necessities of the civil power and the superstition of the vulgar secured to the priesthood. The religion of the world was broken up into fragments, and the State determined the order and the relations in which these should stand side by side. It was a power born to universal command, and to very high and sacred duties. Its first and inalienable vocation, says Savigny,* was to make the idea of right as between man and man dominant in the visible world. What part of life is there, whether domestic, civil, or religious, that is not in some sense touched by this all-embracing yet, I must add, this just definition? But after the promulgation of the Gospel it was found that a new society had been established in the world, claiming to pervade all lands and to command the allegiance of all men in each of them. This allegiance, too, though spiritual in its kind, yet reached in some sense to all their acts, because all the acts of a Christian were to be done to the glory of God, and therefore must needs be under the guidance of the spiritual principle, which had its home in the Church, and whose light came by the channel of her teaching. It is true that this latter kingdom was a kingdom not of this world, but it was in this world ; it had numberless points of necessary contact with its affairs, and the infirmity and corruption that belong to man, in or out of the hierarchy, wrought constantly to increase them by adding others which were needless and hurtful to spiritual ends. How to adjust the claims of these two authorities upon the same ground and in the same subject matter, each claiming universal command, though in respects primarily distinct, was a problem, not indeed impossible of solution, but yet the most difficult, as history bears witness, that has ever been presented to man in his social relations.

* Savigny, *Röm. Recht.*, b. 1, c. 2, s. ix.

There were indeed periods, such as that of Constantine, and more especially of Justinian and Charlemagne, when the harmony of the Church and the State might have seemed to be perfect, and yet all that was necessary for the separate freedom of each to be secured. But there were other periods extending over generations or even centuries when miscarriages in regard to this problem had convulsed Christendom with its longest and bloodiest wars. In no country had there been more frequent and habitual collision than in our own, between the civil power on the one hand, and the Papal chair, with its English partisans, on the other.

Now the records of history appear to show that in days long antecedent to the Reformation, which were prosperous and honourable to both the parties in this great arbitrement, the basis on which they co-operated was this: the civil power lent the support of law and the strong hand to the decrees of the Church, and aided her to make head against the anarchy of the times: the Church promulgated those decrees under the sanction of the civil power, and thus afforded it an adequate guarantee against the encroachments of priestly ambition, while to the people law was presented as an unity, and escaped the risk of losing by division, and perhaps by conflict, the force of its claim on their obedience. It is not necessary to examine up to what precise point this is true, or whether at any time it extended so far as to a formal contract on the part of the Church, surrendering her separate action: all that is now assumed is this, that in such periods as those of Justinian and Charlemagne the general rule was such as has been described.* The submission of the English clergy carried that general rule into fixed agreement.

But although the rules of ecclesiastical order thus went forth in the garb and with the sanctions of civil law, there was no real disparagement in this to the office of the Church, because the hand of the State in Church affairs which externally affixed the seal of law was guided by the mind of the Church. It was not the mere personal will of Justinian that framed the Pandects, and in them gave to the world an immortal store of the principles

* This subject has been very ably treated in an article of the 'Christian Remembrancer,' for April, 1850, entitled 'Church and State.'

of civil jurisprudence, but it was the legal mind of his age that collected from all points and reduced into written maxims the matured fruits of former wisdom and experience, and fashioned them for systematic and authoritative use ; so in the work of ecclesiastical legislation, although the stamp of civil sovereignty gave visible and coercive authority to legislation that was to bind at once in the exterior and the interior *forum*, it was the mind of the Church that advised and informed the Emperor, and practically determined the matter to which obedience was to be paid.

The conditions under which Church-power was to be exercised and issued were, in truth, much more than any question of endowment, the real terms of the contract between Church and State. Endowment, as it became the foundation of patronage, became also the subject of an important and difficult section of Church-law ; but that reciprocity of concessions and intermixture of action, which lies at the root of the idea of contract, is hardly traceable in the history of endowments beyond the one very weighty question of the law of patronage : it is in the mechanism devised for Church legislation that the contract of the State with the Church is mainly to be read.

The apology, therefore, or excuse of the English clergy when they made their celebrated submission to Henry VIII., and formally conceded to him both the initiative and the veto upon ecclesiastical canons, is surely to be found in this—that they may have looked back upon the incessant struggles of England with the Papacy during the centuries from the Conquest to their own for warning, and yet further back upon the great and cardinal periods of the history of the Church, under the three Emperors in particular who have been named, for imitation : and that in those periods they probably perceived how, where Church-law was running under the authority of a State all whose members individually owned allegiance to the Church, the Catholic faith grew in honour and in extension, and the guarantees of social order were maintained. They had also another precedent, less commanding in dignity, but nearer to them, and yet closer to the subject, in the promulgation of the ecclesiastical laws of Anglo-Saxon times under the ostensible authority, not so much joined as mixed, of all

those who met in the councils of the nation, whether spiritual or lay persons : a precedent to which they might reasonably give much weight.

Nay more : this is, surely, an explanation of their conduct much more according to charity than the supposition that the bishops and clergy of a great Christian kingdom, and that kingdom our own noble and true-hearted England, were so drowned in corruption and so lost to every consideration of decency and honour, that with their eyes open they surrendered to the secular authority the sacred charge of the Church in the custody of the Christian faith and discipline ; but it is also far more rational as well as more charitable, first because these extravagant imputations of universal degradation to such bodies of men are in reality, as a general rule, fanatical and irrational to the highest degree : secondly, because the basis upon which they placed themselves was not in the main a novel invention, but one known to history, and recommended by the actual working of the relations of the Church and the State when they had been founded upon it. Of course it is not intended to question that secondary motives may have had a very large share in producing the decision at which the English Convocation then finally arrived. Probably, without the fear of the *premunire* and of the violent character of the king, that decision might not have been attained. But those who would on this account shut out the possible concurrence of better motives, should recollect that all the impure considerations were not on one side. Ambition and cupidity would incline the clergy to retain their powers with the same kind of force, and perhaps with as much force, as the fear of *premunire* would prompt their relinquishment. The question is, did they deliberately sacrifice on the altar of Mammon the sacred deposit of Church authority ? I say no : they gave to the Crown an absolute control over ecclesiastical legislation, in conformity with the tendencies which the works of some unreforming bishops had evinced, even before Henry's quarrel with the Pope ; in conformity with the known practice, if not with any abstract declaration of the ages best to follow, and probably in a trust not unreasonable that the more frank and formal adoption of the same principles would be attended with the same happy results.

It does not, indeed, seem too much to express a doubt, whether there was any other way than the concession of this control over ecclesiastical legislation to the Crown, by which the order of civil society could, in those times of profound movement and imperfect social organisation, be maintained.

Let us not judge the deeds of that generation by standards transferred to them from our own time and experience. We see countries in which religious communities make regulations for themselves, apart from any sanction of the state, other than the protection which it affords to all agreements not contrary to the public law. But how great are the changes by which separate action of this kind has been rendered practicable and safe to society! How has the domain of ecclesiastical legislation been narrowed; the possessions of the Church reduced from a third in some countries, and in others even a half, to a fiftieth or a hundredth part of the aggregate property of the country: above all, the religious disintegration of the body, the sway of private opinion, the diversity of sects and schemes of religion that now prevail, have so neutralised and wasted the political forces (so to speak) of religion, that freedom, as we have recently seen in Scotland, is the utmost to which she aspires, and that of encroachment on civil right, when free, she does not dream.

Yet even now there is no European country in which ecclesiastical societies are exempt from civil control: if we except the melancholy instance in which Religion still with her own hands administers a kingdom of this world, and withholds from the people rights analogous to those of other nations not more worthy, upon the miserable and most destructive plea, that their political servitude is necessary to the ecclesiastical order of the rest of the Roman communion. An instance most melancholy, because the interests of religion are thus represented as requiring, in a form the most unequal, civil degradation for their support; and because, alone among Christian states, the throne of the greatest bishop of Christendom depends not on the will, the wisdom, the affections, or even the indifference, of the people, but is wholly and undisguisedly sustained, in despite of their aversion, and in constant fear of their resistance, by foreign arms.

But to pass to the rule from the exception, or rather the in-

version, which perhaps confirms it: in every other country of Europe the Church is still, even for spiritual purposes, in more or less of subordination to the State. I do not speak of the yet untested, and among us but imperfectly detailed, concessions to the Church in Austria, of which we have but just heard. The known law of Austria was one of stringent controul. Even in France and in Belgium, where she has gained so greatly by revolutions, she is still under such controul, in respect to that large portion of her work which is connected with the education of the young. It may, indeed, be said, and with truth, that the principle of this controul is admitted very generally by the Protestants of the Continent, while in the case of the Roman Catholics it is rendered necessary by their connection with a foreign see; but that as all such connection was cut off by the acts of the reign of Henry VIII., the Church, deprived of her alliances abroad, might have been left more free. I waive the question, on which much might be said, whether, as matters then stood, the abolition of the Papal jurisdiction was to the Church of England more *per se* a privation or a relief. But those who assume without question that her freedom need have caused to the civil power no just alarms, should remember what a powerful incorporation she was at the time. As to property, she was possessed of a third part of the land of the kingdom. As to learning, she alone directed the whole machinery of education. As to law, her ministers were an isolated, and for all the most important purposes, including that of taxation, a self-governing community. As to direct political power, her Bishops and Abbots were a numerical majority of the most important of the two Houses of Parliament. As to influence, her command over personal action by sacramental confession was such, as would alone have sufficed for her security. Looking back to these and other facts, I for one cannot censure either those who asked, or those who agreed, that all the legislative proceedings of the Church should thenceforward be subject to the permission and sanction of the Crown; provided only they had reason to suppose that the powers which they then consented to recognise were to be used towards the clergy and the Church, as it was the duty of the Crown to employ all other powers owned by the constitution; that is to say, in the spirit of general equity and justice, accord-

ing to the paths of law and usage, and for the advantage of the subject.

Before leaving the question as to legislation for the Church, I would observe, that those who are arguing that the Church of England abandoned her office at the Reformation, and therefore has lost its authority, must, on every ground of right and reason, proceed *strictly*. It will not do to convict her of constructive treason, a doctrine leaving no defence to innocence against the bias of the judge. In her, as in every other body, the legislative was the highest power. Did she, or did she not, ever make a semblance of surrendering it? Only we must not answer this question by mixing up together all that belonged to the arbitrary character of the King, the confusion of the times, the real necessities of such times, the general tendency to heighten prerogative and restrain liberty, the claims of rival power, the high-flown ideas of prerogative lawyers; and then, out of all these jointly, filling up every gap with hostile inferences, piece together the members of a charge, not against the men, but against the institution of which they were the trustees.

Regarding, then, the case as it stands in evidence, I cannot find the slightest trace of anything beyond controul given to the Crown, with respect to the enactment of Church canons. The Reformation statutes did not leave the Convocation in the same position, relatively to the Crown, as the Parliament. It was under more controul; but its inherent and independent power was even thereby more directly recognised. The King was not the head of Convocation; it was not merely his council. The Archbishop was its head, and summoned and prorogued it. It was not power, but leave, that this body had to seek from the Crown, in order to make canons. A canon without the royal assent was already a canon, though without the force of law; but a bill which has passed the two Houses is without force of any kind, until that assent is given. Again, the royal assent is given to canons in the gross, to bills one by one; which well illustrates the difference between the controul in the one case, and the actuating and moving power in the other. But the language of those instruments respectively affords the clearest and the highest proof. In the canons (Canon I.) we find the words, "We decree and ordain;" that is, we the mem-

bers of the two Houses of Convocation. But in our laws, "Be it enacted, by the King's most excellent Majesty, with the advice and consent of the Lords spiritual and temporal, and Commons." Whereas in the canons the King does everything except enacting; with a remarkable accumulation of operative words he assents, ratifies, confirms, and establishes; propounds, publishes; and enjoins and commands to be kept.* Every one of these words recognises that the canon has a certain force of its own, while it purports to convey, and does convey, another force. In the one case the Crown is the fountain of the whole authority of the law; the Lords and Commons are its advisers. In the other, the Convocation decrees and ordains; the King gives legal sanction and currency to that which, without such sanction, would have remained a simple appeal to conscience. In statutes, the King enacts with the advice and assent of Parliament; in canons, the Convocation enacts, with the licence and assent of the Crown. I now speak not of what is desirable or otherwise, but simply of the matter of fact: from which it appears that the idea of a separate spiritual power for legislative purposes was much more carefully preserved (and with good reason) by the statutes of Henry VIII., than it had been when Church-law went forth in the Capitularies of Charlemagne, or the code and Novels of Justinian, undistinguished as to the form of its authority from laws purely civil.

Let it be seriously considered whether, so far as the essence of the principles of the Church is concerned, there was any violation of them in this submission and promise of the clergy, more than in the *Placitum regium* which the See of Rome itself, with however bad a grace, has been obliged to endure, and which the whole Gallican Church, the most learned and illustrious of all the daughters of the Roman See, and with it the entire Cisalpine school, cordially received. This *Placitum*, says Van Espen, comes to exist in consideration of the necessary impact of ecclesiastical laws upon the civil rights and secular interests of men. It cannot be restricted to any particular class of subjects. It reaches even to those bulls of the Pope which are dogmatical. *Ex hactenus dictis concluditur, placitum regium æquè requiri ante publicationem bul-*

* Letters Patent, appended to the Canons of 1604.

larum dogmaticarum, quam cæterorum rescriptorum. And he quotes an author much more favourable than himself to the Papal power, who nevertheless holds it allowable—

“*Potestatem sæcularem mandare aut constituere, ut sine suo beneplacito et examine nemo pareat hujusmodi Litteris, vel executioni mandet easdem.*”*

It seems to be becoming a fashion in France, not merely to disown Gallicanism, but to denounce it as a schism, and even as a heresy. But the growth of that fashion, however it may tend to simplify the plea for the Roman Church, does so at the expense of history, and of the ultimate interests of all Christian belief; and in no way derogates from the real force of the precedents which the case of France affords, as they are applicable to the times of which we now treat.

But while, according to the letter and spirit of the law, such appear to be the limits of the royal supremacy in regard to the legislative, which is the highest, action of the Church, I do not deny that in other branches it goes farther, and will now assume that the supremacy in all causes, which is at least a claim to controul at every point the jurisdiction of the Church, may also be construed to mean as much as that the Crown is the ultimate source of jurisdiction of whatever kind.

Here, however, I must commence by stating, that, as it appears to me, Lord Coke and others attach to the very word jurisdiction a narrower sense than it bears in popular acceptation, or in the works of canonists; a sense which excludes altogether that of the canonists; and also a sense which appears to be the genuine and legitimate sense of the word in its first intention. Now, when we are endeavouring to appreciate the force and scope of the legal doctrine concerning ecclesiastical and spiritual jurisdiction, it is plain that we must take the term employed in the sense of our own law, and not in the different and derivative sense in which it has been used by canonists and theologians. But canonists themselves bear witness to the distinction which I have now pointed out. The one kind is *Jurisdictio coactiva, propriè dicta, principibus data*; the

* Van Es; en de Promulg. Leg. Eeeles., Part V., cap. 2, sec. iv.

other is *Jurisdictio improprie dicta ac mere spiritualis, Ecclesie ejusque Episcopis a Christo data*.*

Nor was it wholly lost sight of even in the reign of Henry VIII., as is evident from the Episcopal Commission, and from a remarkable paper in Collier's Appendix, where we are told that the clergy of England have of the king "all manner of jurisdiction and goods; save only such mere spiritualties as were granted unto them by the Gospels and Holy Scriptures."†

Properly speaking, I submit that there is no such thing as jurisdiction in any private association of men, or anywhere else than under the authority of the State. *Jus* is the scheme of rights subsisting between men in the relations, not of all, but of civil society;‡ and *jurisdictio* is the authority to determine and enunciate those rights from time to time. Church authority, therefore, so long as it stands alone, is not in strictness of speech, or according to history, jurisdiction, because it is not essentially bound up with civil law.

But when the State and the Church came to be united, by the conversion of nations, and the submission of the private conscience to Christianity, when the Church placed her power of self-regulation under the guardianship of the State, and the State annexed its own potent sanctions to rules, which without it would have been matter of mere private contract, then *jus* or civil right soon found its way into the Church, and the respective interests and obligations of its various orders, and of the individuals composing them, were regulated by provisions forming part of the law of the land. Matter ecclesiastical or spiritual, moulded in the forms of civil law, became the proper subject of ecclesiastical or spiritual jurisdiction, properly so called.

Now inasmuch as laws are abstractions until they are put into execution, through the medium of executive and judicial authority, it is evident that the cogency of the reasons for welding together, so to speak, civil and ecclesiastical authority, is much

* Van Espen, *Deductio Juris et Facti*, cap. iii. vol. iv. p. 273, ed. 1753.

† Collier, ix. 165.

‡ *Jus hominum situm est in generis humani societate*.—Cic. Tusc. i. c. 26.

more full with regard to these latter branches of power than with regard to legislation.

There had been in the Church, from its first existence as a spiritual society, a right to govern, to decide, to adjudge for spiritual purposes ; that was a true self-governing authority ; but it was not properly jurisdiction. It naturally came to be included, or rather enfolded, in the term, when for many centuries the secular arm had been in habitual co-operation with the tribunals of the Church. The thing to be done, and the means by which it was done, were bound together ; the authority, and the power, being always united in fact, were treated as an unity for the purposes of law. As the potentate possessing not the head but the mouth or issue of a river, has the right to determine what shall pass to or from the sea, so the State, standing between an injunction of the Church and its execution, had a right to refer that execution wholly to its own authority.

There was not contained or implied in such a doctrine any denial of the original and proper authority of the Church for its own self-government ; or any assertion that it had passed to and become the property of the Crown. But that authority, though not in its source, yet in its exercise, had immersed itself in the forms of law ; had invoked and obtained the aid of certain elements of external power, which belonged exclusively to the State, and for the right and just use of which the State had a separate and independent responsibility, so that it could not without breach of duty allow them to be parted from itself. It was therefore, I submit, an intelligible, and under given circumstances, a warrantable scheme of action, under which the State virtually said : Church decrees, taking the form of law, and obtaining their full and certain effect only in that form, can be executed only as law, and while they are in process of being put into practice can only be regarded as law, and therefore the whole power of their execution, that is to say all jurisdiction in matter ecclesiastical and spiritual, must, according to the doctrine of law, proceed from the fountain-head of law, namely, from the Crown. In the last legal resort there can be but one origin for all which is to be done in societies of men by force of legal power ; nor, if so, can doubt arise what that origin must be.

If you allege that the Church has a spiritual authority to regulate doctrine and discipline, still, as you choose to back that authority with the force of temporal law, and as the State is exclusively responsible for the use of that force, you must be content to fold up the authority of the Church in that exterior form through which you desire it to take effect. From whatsoever source it may come originally, it comes to the subject as law, it therefore comes to him from the fountain of law. He is not to ask, from whence it came to that fountain : whether, like the temporal power, from God directly but indeterminately ; or whether it came from Him indirectly but determinately, indirectly as through the medium of the Church, but determinately as cast in the mould of her Faith. The faith of Christendom has been received in England : the discipline of the Christian Church, cast into its local form, modified by statutes of the realm, and by the common law and prerogative, has from time immemorial been received in England ; but we can view them only as law, although you may look further back to the divine and spiritual sanction, in virtue of which they acquired that social position, which made it expedient that they should associate with law, and should therefore become law.

This distinction is well expressed in one of the statutes of Henry VIII. with respect to the Papal privileges :—

“ This your Grace’s realm, recognising no superiority under God but only your Grace, hath been and is free from subjection to any man’s laws, but only to such as have been devised, made, and obtained within this realm, for the wealth of the same, or to such other as, by sufferance of your Grace and your progenitors, the people of this your realm have taken at their free liberty by their own consent to be used among them, and have bound themselves by long use and custom to the observance of the same, *not as to the observance* of laws of any foreign prince, potentate, or prelate, but as to the customed and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and customs, and none otherwise.”*

That is to say, the origin of the matter of the law might be one thing, and the aspect under which it was to be regarded as law was another.

* 25 Hen. VIII. c. 21.—Preamble.

Nor was this principle, thus broadly laid down, without its proper safeguards; for it was in this very Act of Parliament that, while claiming for England an absolute controul over the whole body of law, current or to be current in England, apart from any standing foreign authority, the Parliament inserted the very remarkable section, which imposes a certain limit on the interpretation of the Act, apparently for the purpose of introducing a solemn declaration of principle. It commences thus:—

“ Provided always, that this Act, nor any thing or things therein contained, shall be hereafter interpreted or expounded that your Grace, your nobles and subjects, intend by the same to decline or vary from the congregation of Christ’s Church in any things concerning the very articles of the Catholic faith of Christendom, or in any other things declared by Holy Scripture and the word of God, necessary for your and their salvations, but only to make an ordinance by policies necessary and convenient to repress vice, and for good conservation of this realm in peace, unity, and tranquillity, from ravin and spoil, insuing much the old ancient customs of this realm in that behalf.”*

In this Act, and in the whole legislation of the time, the divine law seems to be taken for granted as something known to all, and never to be the subject of doubt or change. They no more thought of alteration in that respect, or of vindicating a jurisdiction over it, than we should with respect to the laws of arithmetic. In comparing that period with this, and in construing those laws, we should take into account the declining force and clearness of faith in objective, that is, in substantive, fixed, and independent truth.

Now in these observations concerning the common legal doctrine about ecclesiastical jurisdiction, I have not strained, as I believe, the constitution of the country to suit a favoured purpose; nor, on the other hand, in admissions gone beyond the range of principles that have been held by high and established authorities, even within the Church of Rome.

I have suggested, that in asserting the Crown to be the source of ecclesiastical jurisdiction, we should not necessarily deny that original self-governing authority in the Church, which is so noto-

* 25 Hen. VIII. c. 21, s. 19.

rious in history that it the less requires to be guarded by verbal recognitions ; but leave the question entirely open, how and from what source that authority, or any part of it, came to the Crown. And this assertion I will support, by pointing out the existence of an exact parallel as regards secular jurisdiction. It is the unequivocal doctrine of the constitution, that the sovereign is the fountain-head, in relation to the subject, not only of all executive and judicial power in civil matters, but of the power of legislation. But yet I apprehend it is open to any man to question, without offence, whether that power is derived to the Crown from the ordinance of God, or whether through the popular consent or delegation. In the one case there is nothing between the Crown and the Divine ordinance ; which is the Erastian theory when applied to the Church, and, if taken in its native rigour, the theory of the non-jurors as it affects the State. In the other case we may, as political speculatists, either rank with those who nakedly hold the popular sovereignty, or with those who choose a firmer and safer ground in the traditions of English history, and show from them, that according to the actual development of our constitution, the Crown had not only duties towards the nation, but duties founded on compact. And in like manner, we may acknowledge the ecclesiastical jurisdiction of the Crown without in any degree disparaging the inherent self-governing capacities of the Church. We may give reasonable effect to the facts of Christian history, recording the foundation by our Lord himself of a spiritual society—its endowment with the powers of teaching and self-government—its propagation through the countries of the earth—its succession through the centuries of history—and regard the annexation of its spiritual authority, in any of its branches, to the civil power, as one of the many incidents of its varied but never failing fortunes, an incident becoming, under a course of favourable circumstances, possible, useful, necessary ; and then again, when the tide has turned, capable of a tendency to become inconvenient, or useless, or even immoral and destructive.

The other assertion, that this doctrine is one which has had high countenance among the most reasonable theologians of the Roman Church, I shall simply support by a quotation from Van Espen, which, when it was called in question, he explained by

stating, agreeably to what I have already cited, that it referred to all jurisdiction properly so called.

*Verum sicuti Ecclesiæ atque religionis curam crediderunt Principes Christiani ipsis Episcopis tanquam præcipuis ejus ministris, et Apostolorum successoribus, ita quoque ipsis correctionem eorum, quæ Ecclesiam et religionem, ejusque disciplinam spectant, detulerunt; præsertim tamen si quid, quod hanc turbaret, a clericis, seu inferioribus Ecclesiæ ministris, fieri contingeret.**

The real question, I apprehend, is this: when the Church assented to those great concessions which were embodied in our permanent law at the Reformation, had she adequate securities that the powers so conveyed would be exercised, upon the whole, with a due regard to the integrity of her faith, and of her office, which was and has ever been a part of that faith? I do not ask whether these securities were all on parchment or not—whether they were written or unwritten—whether they were in statute or in common law, or in fixed usage, or in the spirit of the constitution and in the habits of the people—I ask the one vital question, whether, whatever they were in form, they were in substance sufficient?

The securities which the Church had were these: first, that the assembling of the Convocation was obviously necessary for the purposes of taxation; secondly, and mainly, that the very solemn and fundamental laws by which the jurisdiction of the see of Rome was cut off, assigned to the spirituality of the realm the care of matters spiritual, as distinctly and formally as to the temporality the care of matters temporal: and that it was an understood principle, and (as it long continued) a regular usage of the constitution, that ecclesiastical laws should be administered by ecclesiastical judges. These were the securities on which the Church relied; on which she had a right to rely; and on which, for a long series of years, her reliance was justified by the results.

I shall now endeavour to support the representation which I have given of the legal doctrine concerning ecclesiastical jurisdiction by citations; and I shall refer chiefly to Lord Coke, because, as he was both a high prerogative lawyer, and of Erastian tendencies in regard to the Church, whatever can be proved from his mouth in her favour may be regarded as proven *à fortiori*; sup-

* Van Espen, *Jus Eccl. Univ.*, part iii. tit. iii. cap. 1.

porting, at the same time, my allegations as to the securities on which the Church warrantably relied, by reference to the statutes of the period.

Lord Coke, then, appears to proceed most unequivocally upon these principles—and to proceed upon them,* not as debateable matter, but as maxims placed beyond all doubt by the theory and practice of the constitution:—

That all jurisdiction, as well ecclesiastical as temporal, proceeds from the Crown.*

That all the laws of the realm are the King's laws.

And all the courts of the kingdom the King's courts: and this whether their acts run in the King's name, or in the names of bishops, lords of manor, or other subjects.

That the Church of England has no laws except such as are laws of the realm.

That all the laws of the realm affecting the Church are likewise laws of the Church.

That the 24 Hen. VIII. c. 12, is a great constitutional statute, distinctly marking out a province of ecclesiastical, and another province of civil, causes.

That the laws ecclesiastical are for the settlement of "causes of the law divine, or of spiritual learning."†

That the laws temporal are "for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil."‡

That the laws ecclesiastical are necessarily to be administered in ecclesiastical courts and by ecclesiastical judges:§ as the laws temporal are "administered, adjudged, and executed by sundry judges and ministers of the other part of the said body politic, called the temporality: and both these authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other."||

That "the archbishops, bishops, and their officers, deans, and other ministers which have spiritual jurisdiction," are "the King's judges" for ecclesiastical purposes.¶

* See also Phillimore's *Burn*, vol. ii. p. 51. † 24 Hen. VIII. c. 12.

‡ Ibid.

§ Cawdrey's Case, p. lxxvii.

|| Quoted in the *Institutes*, vol. vi. part iv. ch. 74.

¶ Ibid.

That the Convocation of the Clergy is a court of which “the jurisdiction is to deal with heresies and schisms, and other mere spiritual and ecclesiastical causes ;” and “therein they did proceed *juxta legem divinam et canones sanctæ ecclesiæ*.”

That they did so before the Reformation, under the King’s writ, often under his prohibition to meddle with civil matters ; often, likewise, with his Commissioners present to take cognizance of all they might do ; so that the statute 25 Hen. VIII. cap. 19, requiring the royal assent to canons, “is but declaratory of the old common law.”*

That the purpose of the Reformation statutes, as understood and solemnly expressed by their framers, was to vindicate and restore to the Crown the ancient jurisdiction which it had enjoyed in previous times ; and which ancient jurisdiction extended over all ecclesiastical and spiritual causes.†

With these principles Blackstone is in accordance ; and in regard to heresy in particular, while he states that the crime might be more strictly defined, that nothing should be prosecuted as heretical until it has been so declared by proper authority, he also avows that, “under these restrictions, it seems necessary for the support of the national religion that the officers of the Church should have power to censure heretics.”‡

The jurisdiction of Convocation as a court for the trial of heresy was asserted in 1711 by the twelve judges and the law-officers of the Crown ; and all of these, except four judges, considered this to be a jurisdiction over the persons as well as over the tenets of the offenders.§

If such be the view of the expositors of the law, let us turn now to the law itself.

The citations I shall make will be for the establishment mainly of these two positions :—

First, that all which the civil power claimed, and consequently

* Quoted in the Institutes, vol. vi. part iv. ch. 74.

† These propositions are chiefly taken from the Institutes. Matter of the same nature will be found in the Report of Cawdrey’s Case, particularly at pages xxvi., xxviii., xxxvi.–ix., xlvii., l., lv.–viii., lxii., lxxvi., lxxvii.

‡ Vol. iii. p. 49.

§ Opinion of the Judges, reprinted from Whiston. Parker, 1850.

is entitled to claim, under the Reformation statutes, was the restoration of the ancient rights of the Crown.

Secondly, that the administration of the ecclesiastical laws would, according to the terms, as well as the spirit, of those statutes, be placed in the hands of ecclesiastical judges.

I. It is well to commence with the Act of the First of Elizabeth, c. 1, because it is even to this day the charter of the Constitution in reference to the subject-matter.

Title.—"An Act to restore to the Crown the ancient jurisdiction over the Estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same."

Preamble.—"In time of the reign of your most dear father, of worthy memory, King Henry the Eighth, divers good laws and statutes were made and established, as well for the utter extinguishment and putting away of all usurped and foreign powers and authorities out of this your realm, and other your Highness's dominions and countries, as also for the restoring and uniting to the imperial Crown of this realm the ancient jurisdictions, authorities, superiorities, and pre-eminences to the same of right belonging or appertaining."

Sect. 2 repeals 1 & 2 Ph. & M. c. 8, "for the repressing of the said usurped foreign power, and the restoring of the rights, jurisdictions, and pre-eminences appertaining to the imperial Crown of this your realm."

And sect. 17 provides that "such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever, by authority of this present Parliament, be united and annexed to the imperial Crown of this realm."

The language of this Act was in entire conformity with that of the Acts of Henry the Eighth—

With the preamble of the great statute for the restraint of appeals, which is set out lower down—

So far as it goes, with the 37 Hen. VIII. cap. 17, now re-

pealed, which declares that “your most royal Majesty is and hath always justly been, by the word of God, supreme head in earth of the Church of England.”

But the Act of Elizabeth stops short of the enactments of Henry VIII., and, as we know, advisedly.

Reference has already been made to the Oath contained in the Act, and to the legislative construction which has been put upon it.

II. The preamble of the great Statute of 1532 is full and conclusive on both points which are under our consideration, and, long as it is, it deserves the most careful perusal and consideration. It is as follows:—

“Where by divers sundry old authorities, histories, and chronicles, it is manifestly declared and expressed that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same :

“Unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, been bounden and owen to bear, next to God, a natural and humble obedience :

“He being also institute and furnished by the goodness and sufferance of Almighty God with plenary, whole, and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of folk, resiants, or subjects within this his realm, in all causes, matters, debates, and contentions happening to occur, insurg, or begin within the limits thereof, without restraint or provocation to any foreign princes or potentates of the world :

“The body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and showed, by that part of the said body politic called the spirituality, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons. to declare and determine all

such doubts, and to administer all such offices and duties, as to their rooms spiritual doth appertain :

“ For the due administration whereof, and to keep them from corruption and sinister affection, the king’s most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said Church both with honour and possessions :

“ And the law temporal, for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, was and yet is administered, adjudged, and executed, by sundry judges and ministers of the other part of the said body politic, called the temporality :

“ And both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other.”

The second section proceeds to recite that laws had been made at divers times to preserve the independence of the crown and its “jurisdiction spiritual and temporal,” but that more were required.

In this most remarkable and perhaps unparalleled preamble we are to observe set forth in the most formal manner :—

1. The assertion of the ancient independence of the realm of England.
2. Of the division of the nation into clergy or the spirituality, and laity or the temporality.
3. Of the supremacy of the crown, in all causes whatsoever, over both.
4. Of the authority, fitness, and usage of the spirituality to administer the laws spiritual.
5. Of its endowment for that very end.
6. Of the parallel authority, fitness, and usage of the temporality to administer the laws temporal, which are defined to be for temporal ends.
7. Of the alliance between these two jurisdictions.

But will it be said that, though the language of this important statute asserted the principle that Church laws should be administered by Church officers, yet subsequent laws completely altered the case ; and while, according to the first, appeals terminated with the archbishop, according to the latter they went on to the king, and power was also given to the crown, in the 1st of

Elizabeth, to redress abuses by the instrumentality of any persons being natural born subjects?

The answer surely is that the construction of those enactments was fixed by known usage in a manner perfectly accordant to the preamble of the 24 Henry VIII. c. 12: that such usage was as imperatively required by the spirit of the constitution, as that the crown should appoint for its judges in the temporal courts, men learned in the law; and that the ground of this usage is fully and constantly recognised by the principle of the lawyers that there must be Ecclesiastical Courts to administer the laws of the Church, and by the practice which prevailed for many generations after the passing of these statutes.

I shall produce two more testimonies from the reign of Henry VIII.

The first is the title of an Act of Parliament since repealed, and therefore only of use to show the intention of the time. It is the 32 Henry VIII. c. 26, and runs thus:—*

“All decrees and ordinances which, according to God’s word and Christ’s Gospel, by the king’s advice and confirmation by his Letters Patents, shall be made and ordained by the archbishops, bishops, and doctors appointed, or to be appointed, in and upon the matter of Christian religion and Christian faith, and the lawful rights,† ceremonies, and observations of the same, shall be in every point thereof believed, obeyed, and performed, to all intents and purposes, upon the pains therein comprised. Provided that nothing shall be ordained or devised which shall be repugnant to the laws and statutes of this realm.”

The object is to give the force of law to canons of the Church not contrary to the law of the land; but the Act clearly shows that it was presumed that such laws would be made only by the bishops and learned clergy.

We have another remarkable attestation of the intention and engagement of the State, that the laws of the Church should be administered by ecclesiastical judges, afforded by the Act 37 Henry VIII. c. 17.

Its object is to render lawful the exercise of ecclesiastical

* The title of 32 Hen. VIII. c. 15, has a similar effect.

† Rites?

jurisdiction by doctors in civil law, if appointed to the office of chancellor, vicar-general, commissary, official, scribe, or registrar, being either lay or married persons; and its terms are strictly confined to such doctors, who were by their profession members of the Church and students and teachers of her jurisprudence.

It recites that, though any canons forbidding such persons to exercise ecclesiastical jurisdiction had been abolished, yet the bishops and other spiritual persons acted at that date (1545) as if the disqualification had been still in force.

And it proceeds to enact—

“That all and singular persons, as well lay as those that be now married or hereafter shall be married, being doctors of the civil law which shall be made to be any chancellor, vicar-general, commissary, official, scribe, or register may lawfully execute and exercise all manner of jurisdiction commonly called ecclesiastical jurisdiction, and all censures and coercions appertaining or in anywise belonging unto the same, albeit such person or persons be lay, married or unmarried, so that they be doctors of the civil law, as is aforesaid.”

Thus it appears (1), that up to the year 1545, all ecclesiastical jurisdiction—notwithstanding the appointment of Cromwell—was commonly exercised by the clergy alone: (2), that an Act was thought necessary to legalise the exercise of it in any form by laymen: (3), that those laymen were to be none other than doctors of civil law.

It appears indeed that the statute has been construed, notwithstanding the repeated words of limitation, as enabling all persons to hold the recited offices; and that such a construction is regarded with some wonder, as surely it well may be.*

To show the intention of the ruling powers during the subsequent reign, as to the final disposal of ecclesiastical causes—apparently of all causes so called, whether purely spiritual or not—we may well refer to the *Reformatio Legum*, which says, speaking of appealed causes brought into Chancery, “*Quo cum fuerit causa devoluta, eam vel concilio provinciali definiri volumus, si gravis sit causa, vel a tribus quatuorve episcopis, a nobis ad id constituendis.*”† Thus the very same document, which carries

* Stephens's Eccl. Stat., i. p. 289 n.

† Ibid., i. 152 n.

to the highest point the assertion of the royal supremacy,* distinctly assigns to the Bishops the exercise, in the king's name, of the appellate jurisdiction.

These citations from the most conclusive sources, during the reigns of Henry VIII. and Edward VI., may probably suffice, because it will generally be admitted that what is true of those reigns in favour of the spirituality, is true *à fortiori* respecting the times of the sovereigns who succeeded.

In the first high commission of Queen Elizabeth, of which the exact composition, I understand, is not on record, there must perforce have been a deviation from the principle, because, as Lord Coke observes, it was appointed for a special purpose, and by way of exception, namely, to rid the Church of those bishops who would not take the oath of supremacy in conformity with the proceedings founded on the Acts of Convocation under Henry VIII. ; acts which had never been canonically reversed.

It would be easy, I apprehend, to show that until about the accession of the House of Hanover, that is to say for nearly two centuries, these two great rules of the policy of the English Reformation were observed with substantial fidelity :—

1. That the Convocation should be the instrument of legislation for the doctrine of the Church.
2. That the ecclesiastical law should be administered by ecclesiastical judges.

In truth it is not enough to call these rules of policy ; for as, to the State, they were constitutional principles, so to the Church they were solemn engagements. Both of them are covered by the preamble of the great Statute of Appeals, and the words of that preamble amount to a solemn engagement. Although in form there can be no contract between the legislative power and any person or body in the State, yet no words of promise could bind an individual more sacredly than the words of that preamble, declaring the spirituality to be the fit and established instrument for administering Church law, should have bound the State : and when the State makes laws deeply affecting any subject body, and sets forth as the conditions and grounds of them matter in which that subject body has an interest, such body has a moral claim to

* See p. 16.

hold the State to its own spontaneous and, in this case, very formal and deliberate declaration.

That the concessions which have been described as made by the Church in the sixteenth century were large is unquestionable. That they had their dangers is a proposition which only places them in the same category with all former and all subsequent adjustments of the same great and most difficult problem. That they were unwarrantable may be the case, but our history until now has not placed it beyond doubt. That they deserved the severe and unmeasured condemnation which some have pronounced upon them, is, in my view, very far indeed from being the case.

It is an utter mistake to suppose that the recognition of the royal supremacy in matters ecclesiastical, established in the Church a despotic power. The monarchy of England had been from early times a free monarchy. The idea of law was altogether paramount in this happy constitution to that of any personal will. Nothing could be more complete than the recognition of the Sovereign as the source both of legislative and of judicial authority for the exigencies of the passing day ; but it was the felicity of this country that its people did not regard the labours of their forefathers as nought, and so realised the inheritance they had received from them, that at all times what was to be done was with them secondary, and what had been done primary ; and the highest works of the actual legislator always aimed at the vindication and re-establishment of the labours and acquisitions of those who had preceded him. Here lay the grand cause of the success of our English revolutions, that the people never rent the web of history, but repaired its rents ; never interposed a chasm between, never separated, the national life of the present and that of the past, but even when they seemed most violently to alter the momentary, always aimed at recovering the general direction of their career. Thus everybody knew that there were laws superior to the Sovereign, and liberties which he could not infringe ; that he was king in order to be the guardian of those laws and liberties, and to direct both the legislative and all other governing powers in the spirit which they breathed, and within the lines which they marked out for him.

A spirit of trust and confidence almost unbounded then was,

and still is, the spirit of the British constitution. Even now, after three centuries of progress towards democratic sway, the Crown has prerogatives by acting upon which within their strict and unquestioned bounds it might at any time throw the country into confusion. And so has each house of parliament. Why is this the case? Because it is impossible to tie down by literal enactments the sovereign power in a state, since by virtue of its sovereignty it can get rid of the limitations imposed upon it, however strict may be their letter. Yet if that sovereign power be well advised, if the different elements of the social body be duly represented and organised, there arises out of their wise adjustment a system of balance and limitation infinitely more effective than any mere statutory bonds. So it has been in the State of England; so, it might well be hoped, three hundred years ago, that it would be with the Church.

At the same time we must discriminate and set aside that which belongs to the political character and bent of the particular period of the Tudor sovereigns, and especially to that of Henry VIII. It is not to be denied that all liberty was in danger then; and church liberty among the rest. If we wonder at the clergy who promised to make no law but with the king's prior and posterior consent, what shall we say of the parliament which gave by statute the force of law to the king's proclamation? The excess in the exercise of royal power over the Church during the sixteenth century is probably due to the absolutism of the period more than to its Erastian tendencies.

The trust reposed by the constitution in the king with respect to civil purposes was this; that he would commonly act in the spirit of the constitution, and would avail himself of the best assistance which the country might afford for ascertaining, fostering, and upholding that spirit, and for dealing according to its dictates with public exigencies as they should arise. And this trust was a trust not speculative only, but accompanied with practical safeguards; these in particular—that for making laws the sovereign must act with the advice and consent of the estates of the realm; that for administering them he would act by and through those who had made the laws the study and business of their life, and who would be best able to interpret them according to their own

general spirit, and by the analogies which that spirit supplied, as well as the mere precedents which its history afforded. I speak of the constitutional system which was gradually elaborated and matured in England, the essential features of which had for many generations exercised a marked influence over the fortunes of the country, and which soon attained such a ripeness as to place both our legislative and judicial systems beyond the reach of the arbitrary will or the personal caprice of sovereigns.

Now, I say, that the intention of the Reformation, taken generally, was to place our religious liberties on a footing analogous to that on which our civil liberties had long stood. A supremacy of power in making and in administering Church-law as well as State-law was to vest in the Sovereign : but in making Church-law he was to ratify the acts of the Church herself represented in Convocation, and if there were need of the highest civil sanctions then to have the aid of Parliament also : and in administering Church-law he was to discharge this function through the medium of Bishops and Divines, Canonists and Civilians, as her own most fully authorised, best-instructed sons, following in each case the analogy of his ordinary procedure as head of the State.

The Church had this great and special security on which to rely, that the Sovereigns of the country were, for a century after the Reformation, among her best-instructed and even in some instances her most devoted children ; that all who made up the governing body (with an insignificant exception) owed personal allegiance to her, and that she might well rest on that personal allegiance as warranting beforehand the expectation, which after experience made good, that the office of the State towards her would be discharged in a friendly and kindly spirit, and that the principles of constitutional law and civil order would not be strained against her, but fairly and fully applied in her behalf.

I do not mean that the Crown was legally compellable to convoke Parliaments or to appoint persons of legal proficiency to be judges ; but without Parliaments it could not make law, and by fixed practice, as well as according to common reason, the laws were administered by those to whom they were a profession, and who were best versed in them. With the same theoretical laxity, and practical security, was provision made for the conduct of

Church affairs. With regard to certain violent exertions of State power over the Church during the reigns of Henry VIII. and Edward VI., during the reign, it must be added, of Mary, and during that of Elizabeth, it is not reasonable to take them as the measure of the intention of the State in the legal provisions it had made for settling its relations with the Church, any more than Magna Charta will bear to be construed by the administrations of the Sovereigns who bore sway shortly after its enactment. For as defective social order permitted constant infringements of the last, so the extreme of political necessity compelled the State to go beyond the spirit of the first. When armed force was commonly employed to determine religious differences: when the ecclesiastical affairs of one country were liable to be taken in hand by the military power of another: when the Pope wielded the temporal as well as the spiritual sword, and claimed and exercised the anti-social, if not anti-christian, prerogative of deposing Sovereigns for renouncing his obedience—then England was really in the condition of a beleaguered city, and the Crown was warranted and bound to settle many matters pertaining to the regimen of the Church by stretches of power that in regular times would have been intolerable, and that with regular times were disused. Yet after all, no one of them perhaps went so far as the *Interim* of Charles the Fifth.

However unconstitutional may have been the Court of High Commission, however inadequate to such questions as the trial of doctrine the Court of Delegates, that which we are now examining, namely, the essential freedom of the Church in her own most sacred functions, was on the one hand secured, while on the other hand harmony was maintained in her relations with the State. And the essence of the whole arrangement was this: that the power of the Church to make laws was retained, but subjected to the consent of the Crown; the administration of Church-law was placed under the guardianship of the Crown, in a confidence, not disappointed through the succession of many generations, that her own Bishops, Divines, and Canonists would be the persons appointed to discharge her judicial functions.

Although, upon comparing in the abstract the concessions of the Parliament and the Convocation respectively to Henry VIII.,

we may find reason to think that while both were great, the former were the larger of the two, yet, practically, there was this great difference the other way: the concessions of the Church had been retained, and after a time she found that she had neither strength to recover them nor to retain her hold of the compensating conditions under which they were made; whereas the Parliament, gaining energy from generation to generation, has not only taken back what it then unduly yielded, but has acquired exclusive possession of the supreme power in the State.

Looking back upon those times in the light of the experience which three hundred years of eventful history have supplied, we are led to palliate the subserviency of the Parliaments of Henry VIII., and to form an exaggerated idea of that of his Clergy; measuring their acts by remote and then unimagined results.

But if we place ourselves in the position of the men of that day, we may arrive at a different view. For at that time there was no clear indication of the coming triumphs of popular freedom. Nor was it perhaps over sanguine, as matters then stood, to believe that the Ecclesiastical Estate, if it could keep united, would be strong enough to secure the permanence of its liberties. And it was united, we must remember, at the time when these things were done.

Obviously it is not by a mere comparison between Ecclesiastical and Parliamentary subserviency that the question of right and wrong can be determined; but it has become a fashion among us unhesitatingly to consign to infamy the Convocations of Henry VIII. without an examination of their case, and they are under sentence as it were of historical outlawry. It seems, therefore, well to throw those lights upon their conduct which a reference to particulars may supply: and there is no part of history of which it is more important to us that we should arrive at a just appreciation.

But it is also important to observe that, as to the point which seems to be most pressed in controversy against the Church of England as fatal to her liberties, namely, the surrender of her own discretion in the exercise of legislative and judicial power, we are ecclesiastically in strict analogy with our political condition. *Now*, indeed, we are secured by the modern principle of

ministerial responsibility; but before the date of this principle our forefathers held by the same tenure their condition as citizens and as churchmen respectively: and the same argument which would prove the slavery of the Church, would also prove that they had no political liberties; which is absurd.

I am led to feel the importance of these remarks partly by the astounding view of the British Constitution which I find in an article in the *Dublin Review*, ascribed to the ablest polemical writer of the Roman Catholic communion of this country:—

“If the Queen is really the supreme head of the Church, or if she is a power in it with appellate jurisdiction, and as she has spoken and pronounced sentence in the ‘*Gorham Case*,’ we do not see what right of interference there is in any one, in regard to the counsellors or judicial sifters of the cause whom she may select and appoint. She and she alone is responsible for this.

“It may be objected that Her Majesty did not choose them, but that they were appointed by Act of Parliament. Be it so. But by whom is an Act of Parliament enacted but ‘By the Queen’s most excellent Majesty, by the advice and consent of the Lords Spiritual and Temporal, and Commons?’ The constitution, therefore, of the council is the Queen’s, or her predecessor’s, for the sovereign has the means of resisting a violence to his conscience.”*

When a writer is possessed with such wild ideas as to the function of Her Majesty in the British Constitution as would make rather better sense if read backwards, we need neither be astonished nor grieved on our own account at any conclusions at which he may arrive respecting the Church in its relations to that Constitution.

Nothing is more clearly essential to any just estimate of the position of the Church under the Royal Supremacy than a proper view of the essential conditions that fix the general position and office of the Crown.

We must recollect that the theory of monarchy in the law of England had its historical basis of fact in the free Anglo-Saxon constitution, running back even to the usages of the German tribes, such as Tacitus has described them. Upon this there supervened, with the Conquest and its results, that idea of Royal

* *Dublin Review*, March, 1850, pp. 256, 257.

power which represented it as in itself absolute and perfect, yet did not repel the notion that it came originally from popular delegation, and even referred this perfection, not to an ideal source or standard, but to the fact that all the powers of the Roman commonwealth—of senate, consul, prætor, tribune, general—had been conveyed to and concentrated in the person of the Emperor. To these again was added the doctrine of the Church, which asserts the Divine origin and sanction of the power of governing. This doctrine, which found governing power *de facto* in the hands of kings, naturally grew into the notion of what is called Divine hereditary right, especially when the abolition of the Roman jurisdiction had removed the influence of a Power whose interest it was to appear as standing between Heaven and the king, and therefore to keep the question open as to the precise nature and limits of the sanction that regal authority derived from Divine ordinance.

From the joint result of these influences, ancient and recent, the idea of the king in the sixteenth and seventeenth centuries had mounted up, in the contemplation of law, even to ideal perfection. The very strongest proofs of it, not only that can be cited, but even, as it seems to me, that can be conceived, are to be found in our having inherited from those times (not from the period when monarchs were formally coerced like John, or solemnly deposed like Edward II. and Richard II.) the doctrine that the king can do no wrong; and in the fact that the Parliament of Charles I. found itself obliged by duty or by policy, or both, to make war against the king, under the formal assumption of his own name and authority for its acts.*

But this ascription of an ideal perfection to the sovereign did not imply that in practice he was free, or in law either, to lay his hands on whom or on what he pleased. The ancient idea of compact had never been extinguished; and upon an adequate occasion, namely at the Revolution, it was reanimated, in terms indeed open to dispute, but in substance with a solemnity and weight of sanction which it has never lost.

But this great and fundamental idea of compact, if it applies to individual subjects, applies also yet more formally to the estates

* See also Allen on the Prerogative, pp. 82, 83.

of the realm, and involves more than the mere personal conduct of the sovereign. If the tenure of the throne itself depends upon the observance of a compact, much more does every other relation that binds together the several component parts of the body politic, in its several orders and degrees of men, as spirituality and temporality.

The forefathers of Englishmen, however, had other and readier securities besides this great *arcanum imperii*, reserved then, and always to be reserved, for the very last resort. It is a well-established principle that the sovereign cannot administer justice in his own person, unless authorised to do so, as any officer of state might be, by statute. "Edward I. frequently sat in the Court of King's Bench; and in later times James I. is said to have sat there in person, but was informed by his judges that he could not deliver an opinion."* And "it is now an undisputed principle that, though the king should be present in a court of justice, he is not empowered to determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority."† The doctrine of this passage is, I believe, that of the great legal authorities. Thus while the immense latitude of nominal prerogative was overshadowed on the one side by the superiority of the combined legislature, it was on the other barred from arbitrary excess by the necessity of operating through responsible instruments. The ideal or legal monarch was invested with these high attributes, while the living one was on almost all sides limited by law, in order that the actual authority under which the work of government is carried on throughout the country in its details might be one and undivided, revered and resistless.

Those who compare the history of the English Church since the Reformation with the history of the Catholic or of the Western Church respectively, in and from the times of Constantine, Justinian, and Charlemagne, may treat with ridicule the hypothesis that the aim of the English Church under Henry VIII. was to reproduce essentially the same basis of the relations between Church and State as existed during the reigns of those emperors.

* Blackstone, iii., p. 41 n.

† Allen on the Prerogative, p. 93.

And yet, after due allowance is made for new disturbing forces, we may find reason to think that there was some essential resemblance between that which men of the sixteenth century imitated and that which they constructed and bequeathed. They lived in times, when corruption had eaten so deep into the framework of the Christian Church, as almost to menace its existence ; and when a movement in favour of Reform, so violent as to convulse society and to set in motion forces which have already disorganised large portions of the Church, and removed entire communities from the Faith, was nevertheless in all probability the actual means, and perhaps the only possible means, of rousing and of saving Christendom.

There were also impending vital changes in the constitution and order of civil society : the downfall of despotism was in preparation : the seat of power was about to be shifted from the hands of a very few to those of large and numerous classes : what the Crown possessed was about to pass into the hands of Parliament. All these changes, beginning or about to begin, were to subject the ecclesiastical relations fixed in the sixteenth century to trials far more severe than the mere brute forces of disorder and imperfect civilisation against which the laws of Justinian or of Charlemagne had had to contend.

The headstrong wilfulness of Henry VIII. and the minority of Edward VI. would have made those periods unsafe as repositories of precedents, even had the course of our traditions from thence never been legally interrupted. But the reign of Mary swept away the laws of the two former princes ; and our direct concern with them is of course limited to such as were re-enacted under Elizabeth. Now it may be asserted without fear of confutation, that from the accession of that princess, notwithstanding the arbitrary notions of three successive sovereigns, the government of the Church was practically in the hands of its spiritual rulers, and preeminently in the hands of those among them who were the most deeply imbued with the spirit of its laws. With due allowance in every sense for the times, that high office of foster-parent which our sovereigns had assumed was not ill discharged until the period of the Great Rebellion.

Although the personal characters of the sovereigns from the

Restoration down to the accession of the House of Hanover, with the exception of Queen Anne, were of a different stamp in regard to their affections towards the Church, yet throughout the whole of that period her essential liberties were respected, except when they were assailed in common, and were also in common vindicated, with those of the State. Her synod was summoned when it was requisite to treat of matters touching her doctrine and constitution; the ordinary administration of her laws was conducted in her courts by appropriate instruments.

And whatever may be said of the gross injustice of the sheer suppression of Convocation, that most eminent example of tyranny, or the law of the strongest, acting under constitutional forms—of its political convenience or necessity, or of the frightful moral evils and utter dissolution of ecclesiastical discipline to which it led the way—thus much at least appears, that if her legislative organ has remained in abeyance, the power it should have handled has been likewise dormant, and it has not been exercised for her, even to the present day, so far as doctrine is concerned, by the temporal authority. Her exterior discipline, indeed, with the decline of religion in the country, was crippled in very important points by the State, as of late on the other hand there have been some small efforts to improve it. As to judicial questions, which are now more immediately before us, so long as the Court of Delegates remained, it was a witness by its constitution to the ancient principle that the ecclesiastical laws were to be administered by ecclesiastical judges. Although it had been progressively altered in its composition, first by the admission of civilians, then by the dropping out of divines, and further by the introduction of common law judges, yet to the last it was composed in the main of ecclesiastical lawyers.

When, therefore, we review our Church history from the time of the rupture with Rome, let us endeavour to take a candid and dispassionate estimate of that to which the Church of England is committed, of the conditions under which she is committed to it, and of that to which she is not committed at all. She is most formally committed to placing the enactment of canons under the restraint of prior permission and posterior confirmation by the Crown, but by a Crown of which the wearer is able to act for himself, and not through the medium, or under the controul, of minis-

ters, virtually chosen by a majority in a Parliament of mixed belief—by a Crown of which the wearer had been wont to consult the synods of the Church, and gave not only the strongest possible indication of his intention, but likewise the most solemn and formal promise of which the case admitted, to do so thereafter, by embodying in the preamble of a great statute the formal declaration, that the spirituality of England, with its own constitutional organisation, was entirely competent to deal with all matters of ecclesiastical legislation, and was accustomed so to do, just as the temporality dealt with questions of temporal right.

Again, she is committed to the exercise of all jurisdiction for her own purposes, subject to the authorisation of the sovereign; but from a sovereign in her communion, and having no political relation to maintain of such a kind as to impair the freedom of his personal conscience as a member of that communion, to impose upon him the duty, or supposed duty, of maintaining a spiritual relation with other and like bodies, or to reduce, in fact, to neutrality, or a moral *zero*, that sonship to the Church for which a king has shed his blood upon the scaffold—from a sovereign, the head of a civil government, all whose component members owed to that Church spiritual allegiance—from a sovereign whose obvious duty it then was to be the guardian of the religious as well and as much as of the civil liberties of the subject, and to provide in the same rational manner for each respectively, namely, by taking care that the laws affecting each should be administered, so far as might depend upon his royal choice, by the persons best acquainted with their tenour and most deeply imbued with their spirit. But of Courts of Appeal, not composed of such persons, appointed by Parliamentary majorities, and assented to by the sovereign on the advice of ministers, whom those majorities had constrained him to accept, the Church knows nothing: and this whether such courts be nominally composed of her members or not, except that if they chance not to be so composed, the evils of such a system, in either case intolerable, are only rendered not perhaps the more real, but only the more glaring. Of the permanent suspension of her legislative organ, on pretence of its defectiveness, but without any attempt to amend it, the Church knows nothing—that is, knows nothing in the way of acquiescence or approval, though she knows, and to her cost,

in the deep practical abuses and corruptions, the stagnation of religious life, and the loss of command over her work, and over the heart of the nation, which it brought upon her. As to the mere doctrine of prerogative, as a repository of vague and undefined powers over spiritual things, from which they are to be produced, as may suit occasion, to overrule, by the help of some shadowy doubt, the plain meaning of statutes, or to browbeat the most temperate assertions of religious freedom for the members of the Church, such a doctrine deserves no more respect at the hands of Englishmen than the twin doctrine respecting things temporal that was in vogue during the seventeenth century, but has long since been consigned to oblivion or to shame. Over a weaker subject it still sometimes utters its indecent vaunts. If it be said these things have been done, and the Church has not remonstrated; the answer is, that care has been taken, by suspending her legitimate assembly, to make general and formal remonstrance a measure of such difficulty, and therefore of such gravity, that it might naturally be regarded as the almost immediate antecedent of separation. Matters are already at a formidable pass, when great constitutional and public organs come to remonstrate before the world with one another. When the Parliament remonstrated with Charles I., the hand that guided the pen was ready to brandish the sword. Nothing but extremities would justify such remonstrances as would alone have fully met the case; and to extremities themselves the question had not come. It was not destruction, but danger—danger smiling and decked with flowers, into which she was thus brought. Neither was it any one single act against which she was called to remonstrate; it is a long and intricate series of changes, most of them affecting directly not herself, but other great constitutional organs, whose action in turn tells upon her state, and the cumulative effect of which has been, to bring her out of the sphere of orderly and regulated freedom, too near to the verge, in spiritual things, of unredeemed and abject servitude. Nor does the victim of oppression lose his title to remonstrate when the cup has at length overflowed, because it may be shown that he was entitled to complain before the swelling mass had reached the brim.

Further, let it be owned that, in speaking thus of the Church, we speak of that sacred and unworldly spirit in her, which ever

conforms to the Spirit of her Lord, which is grieved with all that grieves Him, and draws delight only from that wherewith He is pleased. The State has used the Church's heart and soul thus ill, stopping up the avenues of spiritual life, warmth, and motion ; restricting, enfeebling, and corrupting it. But to the body of the Church, to the concrete mass of good and bad, to the multitude of carnal-minded rulers and teachers, whom it for a long period of time continued to thrust into her offices—to the Church, as an institution endowed with the goods and privileged by the laws of this world, the State has not been in its own sense unkind. It has treated her in the way in which Wordsworth's noble ode represents the Earth as treating man, the spiritual denizen of her domain :—

“ With something of a mother's mind
The homely nurse doth all she can
To make her foster-child, her inmate man,
Forget the glories he hath known,
And that imperial palace whence he came.”

Even so the State has guarded with no small rigour—at least, until a very recent period—not the property alone, but the honours, and not the real only, but the imagined privileges and securities of the Church. She has been plied with indulgences that have enervated her vigour ; she has been carried in the arms of power, and has forgotten to tread with her own feet her own narrow upward way. She has seen men debarred of their civil rights and privileges, because any law conferring them would also confer upon them an influence over her fit only to be exercised by her members ; and she learned with ease and long retained, and even yet has but half unlearned, the baleful lesson, that taught her to rely on these spurious aids ; to accept these illusory, and even at length unjust, compensations for the silent decay and overthrow of her natural defences. Anticipating extremes which have not arrived, men already say ; the blandishments of Dalilah have lulled her into false repose ; she awakes at the clank of her fetters, and she finds that the lock of her strength is shorn.

Considering, however, what upon the whole England has been for the last three hundred years, and what share the Church has had in making England such ; what place she holds in the mind of the

country and in Christendom ; what she has done for the religion, and what for the civilisation of mankind ; how she has carried down her life, and the unimpaired deposit of the faith, through so many ages of subtle and varied trial to the present day ; what promise she now exhibits that she may yet, and soon, valiantly contend for the Gospel against its adversaries, on behalf of Christendom and the faith of Christendom at large, and not only for her own children in her own border—I for one cannot take part with those who say that the English reformers betrayed their trust ; I cannot think that after due allowance made for human infirmity, their work has been wholly condemned by its results ; I cannot express a preference over the alternative they chose, for any among the alternatives they rejected ; such as re-attaching the Church of England to the Roman obedience ; reconstituting it after the Presbyterian platform ; or parcelling it out by the scheme of Independency.

But neither can it be admitted that if the justification of the reformers is to rest on such grounds as the foregoing, their reputation can owe thanks to those who would now persuade the Church to acquiesce in a disgraceful servitude, and to surrender to the organs of the secular power the solemn charge which she has received from Christ, to feed His sheep and His lambs ; for the real feeder of those sheep, and those lambs, is the Power that determines the doctrine with which they shall be fed, whether that determination shall profess to be drawn straight from the depths of the mine of revealed truth, or whether it shall assume the more dangerous and seductive title of construction only ; of a licence of construction which disclaims the creation, the declaration, or the decision of doctrine, but which simultaneously with that disclaimer has marked out for itself a range of discretion which has already enabled it to cancel all binding power in one of the articles of the faith, and will hereafter as certainly enable it to cancel the binding power of all those which the first fell swoop has failed to touch.

No ; let us vindicate the reformers by showing that we believe their conduct to have been guided by reasons which existed for them, though they no longer exist for us ; and let us imitate them by labouring to fix the position of the Church for our own time,

according to the conditions and the prognostications which the time itself not offers only, but rather thrusts and forces on our view.

By some—as for example, by Roman Catholic writers—it may be said that the account here given is a plain admission that the Church of England under Henry VIII. deliberately consented to enter into a state of slavery. Now, whatever the state was, they are right as to the fact that there was a consent of the Church to certain most important terms; and it is necessary to put it prominently forward, because there is a notion at the present day, that to talk of the Church as consenting to be dealt with in this or that manner is like saying that gold-leaf had consented to be beaten, or wool to be carded: a notion, as unhistorical as unreasonable, that the Church never had any independent rights with which to part, which it is necessary to shut out in express words, because its singular convenience in eking out defective arguments makes up for its injustice and its falsity. The Church did as the Roman Catholics truly allege, consent to the state into which she entered at the Reformation, so far as that was fixed by statute. The fact is important; because if she once had these independent rights, her former possession of them at once suggests the further question, whether, and under what circumstances, she might be bound in duty to resume them; and the fact is even more clear than it is important. It was no tacit, no obscure, no hurried, no equivocal consent. It was a deliberate consent, after consideration upon the several heads which have already been recited; and with respect to all that part of the consent which touches legislative power, the 25th Henry VIII. chap. xix., having fully set out in the preamble the submission and petition of the clergy, commences the enacting part with the words, “Be it therefore now enacted, by authority of this present Parliament, *according to the said submission and petition of the said clergy;*” and it then proceeds to provide accordingly.

That reputed contract, therefore, between Church and State, which in general does no more than construe into words what has been theretofore expressed in acts alone, and which is, in fact, the philosophy of history in one particular department, in the present instance is a literal as well as a virtual truth, so far as relates to

the terms of the consent, submission, and petition of the Convocation, to the acceptance of them by the king and Parliament, and to whatever was truly and constitutionally involved in that acceptance. The review of the laws ecclesiastical, indeed, has no longer any effect for us, as the scheme ultimately failed of effect, and has now no legal or practical being ; and the particular title of Head of the Church has been wisely exchanged for the more modest and true appellation of Supreme Governor of the Church of England.* But, subject to these two limitations, the above-named consent of the clergy has become the law of the land ; and the responsibility of it, whether for good or for evil, or for both, has descended upon the English Church, and upon its clergy of the present day.

Doubtless the treaty (so to speak) between the civil and the ecclesiastical power, which was elaborated in words so remarkable by the men of that day, was a treaty of the kind which in the law of nations is called real, a treaty intended to bind the successors without limit of time.

But doubtless, also, it was a conditional treaty. Its conditions were partly expressed in the framework of the several statutes of the epoch, partly presupposed, and experimentally known, in the subsisting constitutional system.

Not that any slight changes in the law, or any changes, however great, which might consist with the spirit of union and harmony between Church and State, and with the due and free discharge by each of its essential functions, ought to disturb the foundations of that settlement. But changes which do not so consist, must evidently at a certain point of their progress bring the settlement itself into question.

It may be said that to speak of a treaty as subsisting between the State, which is sovereign, and the Church, which is subject, appears a licentious use of terms. For treaties must be between powers actually, as well as originally, independent.

Yet we speak of the treaty of union as a binding one between England and Scotland, although both are now, in their separate capacity, subjects, and the imperial legislature alone is sovereign ; and circumstances are conceivable, though in the highest degree

* 1 Eliz., c. 1, s. 19.

improbable, which might justify and even require the dissolution of that treaty, and the resumption by each nation of its original independence.

But if we waive this argument, and regard the Church as simply subject, the rights of subjects, whether as individuals or as bodies, to have the laws of a country adjusted from time to time, according to the dictates of reason and justice, are not the less certain and sacred, because they are indeterminate or unwritten; on the contrary, they are both certain and sacred in the highest degree, of which any right growing out of human relations in society can admit.

Besides, it is impossible in any case to forget this,—that the independence of the Church, in regard to legislation, had never been definitively surrendered by her on any earlier occasion. She then agreed by compact to do what she had formerly done by discretion only. When she made that agreement, it was in her power not to have made it. By making it, she did not—nay, without forfeiture of her essence she could not—acquit herself of the obligation at all times to judge and to act, in relation to the State and in all other relations, as the fulfilment of her essential purposes might require. Because that obligation was founded, not merely in her right to prolong her historical existence, but in the perpetual ordinance of God, imposing on her various members duties towards one another, which were of the primary law and conditions of her being. And as no assembly of parents, which might ever so formally bind itself to give over to the State the charge of their infant progeny, could be justified in adhering to so unnatural a compact, so no assembly of Bishops and clergy, inheriting the injunction of Christ to feed His sheep and His lambs, could, by any agreement whatsoever, make over to any other body than the Church herself that feeding office, or in the smallest degree derogate from their own awful responsibility for its fulfilment. If they made such a compact as was originally to that effect, it was null and void *ab initio*. If they made, as they did make, a compact which originally was not to that effect, but which might or may become so, then from the moment when it has so become, it is null and void in spirit, and its nullity and avoidance in spirit would entail upon them, as their first duty, likewise to

put an end to it in form, at the earliest moment practicable after the facts should have been clearly established.

It has appeared, then, that the statutes of the Reformation disavowed any aim at establishing a system of principles novel in our law touching ecclesiastical jurisdiction; but sought to provide effectual safeguards on behalf of the State, for the principles on which British law had theretofore been founded, but which the exorbitant power of the clerical estate tempted it, notwithstanding repeated acknowledgments, from time to time to question; and that while these safeguards have undoubtedly answered their purpose of securing the State from encroachment, they have not, until the recent disastrous instance, which is now agitating and threatening to rend the Church, brought its faith into jeopardy by any doctrinal decision at variance with the declarations of her own organs.

It now, however, appears that the actual machinery provided for the decision of doctrinal questions on appeal, has yielded a result in the *Gorham* case which, had the Court been one binding the Church *proprio vigore*, would, according to high authorities, have involved her in the guilt of heresy.

And since this is not, as has been most unreasonably alleged, the proper, though late, fruit of the great statutes and instruments of the Reformation, but the consequence of deflection from their spirit, their letter, or both, it becomes us carefully to examine the nature, the amount, and the steps of that deflection.

Let us, then, assume as our starting point, that which the reason of the case and the law of the land appear to indicate as the just one—namely, the statute of Elizabeth. Of course, those particular enactments of former reigns which still subsist must be taken into view; but the general idea of the royal supremacy, for which the Reformation has to answer, ought in fairness to be taken from such laws and acts as remain, not from those which have passed away. This idea I take to be represented in the universal annexation of corrective jurisdiction to the Crown; in the establishment of the controul of the Crown over ecclesiastical legislation; and, on the other hand, in the reference of those measures to the single principle that they were part of the ancient rights of the Crown of England, and in the formal assurance

that no other than those ancient rights had been, or would be, claimed.

Since that time, three material changes have been made in favour of the Church—namely, the following:—

First. That all ecclesiastical jurisdiction, except that of the last resort, should be exercised, not only by the instrumentality, but under the direct authority, of the Archbishops and Bishops.

Secondly. That the Court of High Commission has been abolished, and all such courts condemned in sweeping terms by the Bill of Rights. For although Lord Coke contended that the issuing of such a commission lay within the ancient prerogative of the Crown, Bishop Stillingfleet, observes Mr. Stephens,* has shown that the cases quoted by him do not come up to the point; and, at any rate, what is material to our present purpose is to remark, that by such courts the Crown proceeded *in primâ instantiâ* against persons by ecclesiastical censures, which it has been unable to do since their abolition.

Thirdly. That the work of visitation, involving so much of the ordinary government of the Church, soon ceased to be employed as at the immediate bidding of the Crown, and for the purposes of ordinary government in the Church; and its executive acts, in virtue of the supremacy, have been reduced by the course of practice within a very narrow compass, and now have relation to matters of necessary form, although even these are not wholly unattended with embarrassment.

But there have been other, and much more important, changes the other way.

The greatest of these has been the suspension of the sittings of Convocation.

The legislative power in any body or society, which is the highest, is the proper instrument for correcting the errors which may be committed by the inferior powers, whether executive or judicial.

So long as a legislative power is in a state of activity, it may securely entrust to the executive the ordinary controul of the administration of justice; and if any serious errors are committed, there are early opportunities of correction.

* Stephens's Eccl. Statutes, vol. i. p. 357 n.

But when the legislative organ has been permanently suspended, every other power in the body passes gradually into a false position. The eye of the supreme supervision is closed; a great void, in the first instance, is created. Of the power taken from its lawful owner, much remains waste; part passes to the civil legislature, part becomes licence in the hands of private persons, part falls to the executive governors, and lastly, part to judges, who, under such circumstances, tend more or less, and quite independently of faulty intention in themselves, to become makers rather than interpreters, and thus masters rather than servants, of the law.

This evil is especially serious, when the ultimate judicial authority is lodged in a quarter, where the welfare of the body affected by that authority must ordinarily be not the first, but a secondary, consideration. We are thus brought to consider the second great change, adverse to the Church, which has so greatly changed to her disadvantage the position defined for her at the Reformation, namely, the change in the personal composition of the Nation and of the State. She then contracted with a State, of whose policy it was a capital part, that all its members should be her members too; and her members, moreover, not by a nominal profession only, but through a membership tested in the most searching manner by periodical participation, subject to public discipline, in her highest ordinance. And that this circumstance entered essentially into the considerations upon the strength of which she made her bargain, we may well judge, not only from the writings of her divines bearing upon the subject, but from the tenacity with which her governors resisted the toleration of Dissenters and their admission to political privilege. It is to be hoped and presumed that they did not do this from selfishness and pride; at any rate it is obvious that what they resisted was a claim not merely to civil privileges, but to the exercise of powers that included much controul over her own destinies, and that, augmenting their pretensions by slow degrees, have now fastened upon her the degrading imputation, that she has given over the decision of the doctrine of Christ into the hand of the powers of this world, and has vilely sold to Cæsar the things that are of God's own image and possession.

While the pretensions of the State have been in constant growth,

its composition has rendered it progressively less fit to exercise even the qualified functions it had before possessed. Divisions of opinion have multiplied ; the nation is broken up into many sects and religions ; all claim the equal exercise of political power, and nearly every claim has been admitted ; so that with respect to those which remain unacknowledged, there are many who think that we offend seriously against the principles of social equality by withholding them ; while on the other side no real principle is involved in a continuance of that refusal.

The third great change in the position of the Church is from this : that the personal will of the sovereign has lost its ancient place in the constitution of the country.

The Church had at the Reformation, and now has by law, the presumed security, that the sovereign shall be a member of her communion. When, therefore, the individual conscience and conviction of the sovereign was recognised as a powerful element in determining the course of policy and legislation, the Church might well look upon this relation to the Crown as a most important safeguard.

But the altered position of the Crown has gradually been reducing, and has now perhaps destroyed, the value of such a safeguard. The sovereign, whom the English Church at the Reformation acknowledged for her head, was one enabled by his position, and in fact accustomed, to rule with a strong hand the temporal no less than the spiritual estates ; and if there then was danger of her enslavement, it was from him and not from them. That danger she was content to meet in the strength which her relation to his private conscience gave her.

But from the time when Parliament began to coerce the sovereign, to the time when, perhaps we may say in the year 1829, there was no more struggle because the sovereign had ceased to resist, the Church was drifting from her position ; instead of one master she was coming to have many ; it is now the majority of the Commons' House of Parliament to which she must look as being in effect the Crown's capital adviser with respect to the exercise of its ecclesiastical supremacy.

The fourth great change in the position of the Church is to be found in the progressive alterations of the composition of the courts

by which ecclesiastical causes were to be tried. We have seen that it was a fundamental idea of the Reformation that the spirituality was the proper instrument, according to the Constitution, for the administration of Church affairs.

The highest legal authority, that of Lord Coke, assures us that upon this principle the judicial system of his time was framed. He says it was most necessary that for deciding finally questions of heresy, clergy, discipline, immorality, and a multitude of others which did not belong to the common law, ecclesiastical tribunals should be established.

Accordingly, we find that it was the practice of the Crown, for a long series of years from the Reformation, to act upon the principle *cuique in arte suâ credendum* as regarded spiritual, not less than temporal, matters. And so it is understood that the Court of Queen's Bench would still act, if the presentee to a living, applying for a *quare impedit*, were impugned by the Bishop on the ground of heresy.

The most important functions of the ecclesiastical judicature, connected with the State, were discharged from the Reformation till the Great Rebellion by the Court of High Commission. We are told that, during the Tudor period, these Commissions were not enrolled in Chancery, "lest their lawfulness should be impugned upon such a publication."* It may therefore be difficult to ascertain exactly what the composition of this Court may have been on each occasion of its appointment. But the detail is hardly necessary, inasmuch as we know that it was always regarded as the great engine of episcopal oppression by the opposite party, which clearly shows what influence predominated in it. Neal mentions its even meeting at Lambeth. Strype names twenty-eight of the persons in the Commission of 1576. Of these, ten appear to be Bishops, six other clergy, eight civilians, four judges and officers of State. But the enumeration is incomplete.†

With the Court of High Commission in 1640 ‡ fell the original jurisdiction of the Crown in matters ecclesiastical. It had originally been exceptional according to Lord Coke, and the

* Brodie's *British Empire*, i. 155; 4 *Inst.* 326, 332.

† Strype's *Grindal*, p. 309.

‡ 16 *Car. I.* c. 11.

power given to appoint it had reference to the peculiar crisis in the Church at the commencement of the reign of Elizabeth ; and the words of the Bill of Rights seem to imply that even when legal it was unconstitutional.

The appellate jurisdiction was exercised through the medium of the Court of Delegates. There is no example, we are told by Bishop Gibson, of any peer or common law judge appointed to any Commission before the seventeenth century, and not more than one in forty Commissions down to the Great Rebellion. The records of the Court now available commence in 1609 ; and during the whole period of two centuries and a quarter, down to 1832, there appears to have been before it only three cases of heresy.* The Commission of 1712, in Whiston's case, comprised five bishops, five civilians, and three common law judges. It thus appears that there had been a considerable change within a hundred years, but still the two main elements of the Court were bishops and ecclesiastical lawyers.

Although the cases of heresy tried, between 1609, when the records of the Court commence, and 1832 were only three, and all these without any issue : although there never was a question tried before that Court approaching that of *Gorham v. the Bishop of Exeter* in dignity or importance ; yet to the very last that Court retained this not unimportant token, at least, of the character of a Court spiritual—that its judges, for whatever causes, were mainly civilians.

In the time of Blackstone, as he himself has told us, the case stood thus : “ This Commission is frequently filled with lords spiritual and temporal, and always with judges of the Courts at Westminster, and doctors of the civil law.”† And from Haggard's Reports, I find that in 1781, even upon a question whether a marriage might not be declared void on the ground of force and custody, the Commission of Delegates contained three lords spiritual along with three lords temporal, three common law judges, and three civilians.‡

Enough has now been stated to show that, for a long time, the

* Parl. Paper, No. 322, Sess. 1850.

† Blackstone, vol. iii. p. 66.

‡ Haggard's Reports, vol. ii. p. 436.

pledges of the Reformation epoch were not forfeited, and the theory of our great lawyers kept in vigour by practice, in regard to the vital principle, that the laws ecclesiastical should be administered by ecclesiastical judges. It may however be said, certainly the courts spiritual of a certain era were ecclesiastically composed; but the Crown *might* have composed them otherwise. I answer, the Crown was free to compose them otherwise, but only as it was free to do anything else that is wrong, and that is contrary to the spirit of its trust. The Crown could not have composed them otherwise without acting in violation of the spirit of the Act of the 1st of Elizabeth, and of the letter, not indeed of the enacting part, but of the more solemn preamble, of the Act of the 24th of Henry VIII.

If it be asked, why then did later times infuse more and more of the secular element into the Court of Delegates? and why did a commission of bishops and judges recommend that causes in appeal should come to the king in council?—I answer to the first question, that there is scarcely a single precedent of any kind set in the Church for a century after the accession of the House of Hanover, which is good for any purpose but that of a warning: that (for religion) disastrous century, in whose ecclesiastical archives, not yet nearly unrolled, every loathsome abuse

“Hides its dead eye from the detested day.”

To the second I reply by adopting the sentiment which the Bishop of Bangor has recently expressed in a letter to his clergy. The period of a century and a half or more had produced but three causes* for heresy in the Court of Delegates, and none of those causes came to any issue. The first cause, that of Salter against Davis in 1690, was disposed of, in another form, by the Court of Queen’s Bench. The second, that of Whiston, went to Convocation. In the third, that of Havard against Evanson, in 1775, the appellant desisted. Under these circumstances it might readily be assumed that that branch of the appellate jurisdiction was virtually extinct, and the recollection of it might easily be lost among the multitude of mixed questions, and questions only in name ecclesiastical, for which an improved

* Parl. Paper, No. 322, Sess. 1850.

provision had to be made ; and also amid the still greater mass of questions purely civil, that come before the Privy Council in appeal. The trial of doctrine by this Court had become a thing unheard of in the Church of England ; and what has just now started forth in giant form, was, when the latest statute was framed, probably overlooked, and (according to the saying) given into the bargain.

It is not too much to say, the appellate jurisdiction in cases of heresy, legally enacted at the Reformation, has never actually lived. Thrice only has it moved ; and thrice without effect.

“ *Ter conatus erat circum dare brachia collo :*

Ter frustra comprehensa manus effugit imago

Par levibus ventis, voluerique simillima somno.”

Since I wrote thus far, Lord Brougham has declared from his own recollection that the conjecture already made was correct ; and that cases of heresy were not taken into view at all on the passing of the Act of 1833.

In the year 1832 an Act * was passed which transferred the powers of his Majesty in Chancery over ecclesiastical causes to his Majesty in the Privy Council. This change had been recommended by the Commission which sat in 1828 to inquire into the state of the ecclesiastical law.

It does not appear what was the precise view of that Commission as to the mode in which these causes were to be tried, as there was at that period no fixed or statutory Court of the Privy Council. But the presumption is, that they contemplated the reference of all such matters to the two Metropolitans and the Bishop of London, together with the Dean of Arches and Judge of the Admiralty, both of whom must necessarily have been bred in Doctors' Commons, and the latter of whom has frequently been also Judge of the Consistory Court of London ; possibly also with the addition of the Lord Chancellor, or one of the common law judges.

Whether a good Court or not, this would still without impropriety have been called an Ecclesiastical Court ; and its institution would not have destroyed, though it would certainly have

obscured and impaired, the principle established in law and history by the Reformation. We cannot, however, do justice to the Commission without bearing in mind, that they did not intend this Court to be a tribunal for the trial of heresy.

But in the year 1833* it was enacted that all causes coming to the King in Council should be tried by a Committee, to be composed of at least four out of a number of persons, of whom all must be laymen : a very small proportion only could be civilians ; none of the rest, except the Lord Chancellor, need be members of the Church of England. Nay, the Court might actually be composed in any given case of persons holding their offices only during the pleasure of the Crown, that is to say, of the Minister of the day.

This court then was a court essentially civil, not only in the sense in which, as Lord Coke observes, the bishops' courts, the courts of the lords of manors, and others, are all nevertheless king's courts, but also because its personal composition was in substance temporal : the lay ecclesiastical lawyers, who should have but a secondary place by the side of bishops or divines in a court for the trial of doctrine, were here the only element at all related to the subject-matter ; it could but be an insignificant one, and not even a single civilian need by the constitution of the court have sat upon the *Gorham* case. It is vain to lay stress upon the unmeaning arrangement for the presence of bishops at the hearing of such a case, which has been unduly embellished with the name of assessorship. For, first, they are few in number ; secondly, so many other qualities are of necessity to be regarded in the choice of archbishops, and likewise in filling the see of London, that the three persons, who are officially Privy Counsellors, can very rarely be the best theologians of the Episcopal Bench ; thirdly, their presence is not required by law ; fourthly, they are no assessors at all, have no defined function, and need not when present be consulted at all, or may be consulted on the small points and not on the great ones ; fifthly, the whole system of such consultation is secret, and irregular, and in the highest degree irresponsible, and no blessing can be expected to follow it.

Here then we have arrived at a plain and a gross violation of

* 3 & 4 Gul. IV., c. 41.

the principle recited in the preamble of the 24th Henry VIII., that the spirituality, according to the constitution of the realm of England, administered the law spiritual, as the temporality administered the law temporal; the principle declared by Lord Coke, that the king administers his ecclesiastical laws by his ecclesiastical judges, a principle of universal application, but of the most especial and vital application, it need hardly be observed, in the trial of doctrine. And thus I arrive at the answer to my second question proposed at the outset, namely this, that the present composition of the appellate tribunal, with regard to causes of doctrine, is unreasonable, unconstitutional, and contrary to the spirit of the Reformation statutes.

The cure, it is obvious, must be sought in a return to the principle, of which those statutes certainly contemplated and pointed out, even if they did not in their letter require, the observance.

But we come now to the third question, Is the royal supremacy, according to the constitution, any bar to such an adjustment of the appellate jurisdiction as should qualify it to convey the sense of the Church in matters of doctrine?

I answer in the negative, and for several reasons.

First and mainly because the royal supremacy was constitutionally exercised in ecclesiastical causes by ecclesiastical judges. Whether therefore we regard the appellate jurisdiction as a part of the supremacy simply restored to the crown, or as having its origin in the statutory enactments of the 24 and 25 Henry VIII., it matters not, in so far as that in the former case no less than in the latter the constitutional mode of its exercise through ecclesiastical judges is clearly pointed out.

The culminating point of the supremacy was in the reign of Edward VI., that reign when the *Reformatio Legum* announced to the world that the decision of grave causes of doctrine was to be intrusted to a Provincial Council.

But secondly, Are we quite sure that the appellate power is a part of the royal supremacy in matters ecclesiastical at all? I propound this question of course with deference; for Blackstone tells us, "as the head of the Church, the king is likewise the *dernier ressort* in all ecclesiastical causes."* It would perhaps

* Blackstone, vol. i. p. 280.

have been too bold to propound it at all, had Blackstone apparently paid much attention to the point; but he does not appear in any manner to advert to the plain fact that the king had not been declared head of the Church when the appeal was given, nor to have taken it into his view, that the statute, which attaches that title to the Crown, had not been in force for two centuries before he wrote.

It is, with a view to clear comprehension of the case, a question of the highest importance, What is this appellate jurisdiction of the Crown?

It did not historically flow out of the doctrine of the supremacy. It was not established in terms affiliating it to such a parentage. On the contrary, it was established before the legal doctrine of the Reformation concerning the supremacy was announced by the law, and in terms demonstrating its much nearer relationship to a power well known to the canon law, thoroughly incorporated in the system of the Gallican Church—while there was a Gallican Church—and founded in the first necessities of the social order.

The High Commission Court, not the Court of Appeal, was the genuine offspring of the statutory provisions concerning the supremacy, and it exercised an original as well as a final jurisdiction. It first appeared in the first year of Elizabeth.

The course of appeal was determined by statutes of 1532 and 1533, while the statute declaring the king's headship was not passed till 1534: it was by that statute, and not before it, that all lawful corrective ecclesiastical jurisdiction was annexed or attached to the Crown.

The statute of 1532, 24 Hen. VIII. c. 12, provided* that certain appeals should not go to Rome, but should be from the archdeacon to the bishop, and from the bishop to the archbishop, in his court to be "definitively and finally ordered."†

The act of 1533, 25 Hen. VIII. c. 19, extends these provisions to all ecclesiastical causes,‡ and then gives an appeal to the king in chancery, with the remarkable expression that it is to be "for lack of justice" in the archbishop's court.§

* Sect. 4.

† Sect. 5, 6.

‡ Sect. 3.

§ Sect. 4.

Now this appeal for lack of justice is very nearly a translation of the French *appel comme d'abus*. The expression is not employed by the statutes in giving the appeal to the bishop or archbishop, and can hardly have been introduced without a special meaning.*

I am far from presuming to assert that this appeal was identical with the *appel comme d'abus*. But it seems clear, on the other hand—1. That it was appointed in a sense distinct from that of the common and purely ecclesiastical appeal: 2. That the *appel comme d'abus* was by no means merely analogous to the power of prohibition exercised in our common law courts for the protection of civil rights. Van Espen says—

“Instituuntur appellationes ab abusu, cum adversus decreta conciliorum, receptas consuetudines, et jura regni aut jurisdictionem regiam, Judex Ecclesiasticus aliquid per abusum attentat; quod his verbis a Pragmaticis efferrī solet; cum violantur Decreta, constitutiones regie, et Libertates Ecclesiæ Gallicanæ.” †

This description of appeal arose in France, as did the appeal in England, in the earlier part of the sixteenth century, under Louis XII. and Francis I. The clergy of France laboured to obtain a definite enumeration of the matters in which these appeals should be allowed; but the Crown always answered that the right was general.

At any rate let this be observed: the Crown possesses the appellate jurisdiction, if we construe the two statutes 24 and 25 Henry VIII. together, under the express cover of the remarkable preamble that assigns to the spirituality the administration of ecclesiastical laws: and in conformity, as we have seen, with this preamble, was the appellate jurisdiction for a very long period actually exercised. Let this be so again in the matter of heresy. The sense of the Church will be sufficiently expressed, and the Royal Supremacy consistently maintained.

Those who have given their adhesion to the system of Church and State as it has existed in England, may, it is possible, have

* There is a marked analogy to the language of the Constitutions of Clarendon:—“Ab archidiacono debet procedi ad episcopum, ab episcopo ad archiepiscopum, et, si archiepiscopus defuerit in justitiā exhibendā, ad dominum regem perveniendum est postremò,” &c. (Art. VIII.)

† Jus Eccl. Univ., Part III. tit. x. cap. iv. sect. 30.

conceded too much to the civil power in respect of controul over legislative and judicial action in the Church.

But this, at any rate, must be plain to all who think that God has revealed a certain doctrine and appointed an organ for its propagation, that such a scheme as the scheme of the Reformation has here been described to be, and as probably prevailed more or less at former periods of the history of the Church, absolutely requires and presupposes in order to its justification on principle, or to its practicability in action, a prevailing and pervading harmony in the composition of the Church and the State respectively.

Whether or not, when such a harmony prevails, the Church can be justified in consenting to act only within the bounds and for the effects to which the State is willing to attend her with its civil sanctions, it is plain that a system of the kind becomes unchristian, and even directly immoral, as opposed to the first dictates of conscience, when the State is composed in great part of those who do not own the authority of the Church at all, and when, in the minds of a further and large portion of the community who profess her name, the idea of their relation to her has become a merely social and legal idea, and no part of the creed in and by which they hope for salvation.

The proposal to introduce in some form, and that form the one most favourable to the State and its influence, the voice of the Church into the trial of doctrine, is one that tends not to aggrandisement, and not to strife, but on the contrary to peace.

It can hardly be expected that those who acknowledge a spiritual allegiance to the Church will either waive their own convictions, or yield their place within her pale, because, under a very recent law, there has appeared the wholly novel phenomenon of a court essentially temporal declaring the doctrine of the Church in a matter of the highest nature, and in a sense opposed to that of the Catholic faith: and especially when the lessons, which they learn from the history of their country, induce them to believe that the statute creating that court is truly and properly, with reference to the present purpose, an unconstitutional statute; the cause, as we now know, having been an oversight on the part of its framers.

Let us consider a little, then, two points: first, whether it is unreasonable for those who are now shaken in the very groundwork of their ecclesiastical position to press with urgency for a change in the law, rather than to abandon the communion of the Church; secondly, whether that change may the more fairly be prayed for, on the ground that the system now prevailing for the trial of causes of heresy, although legal, is unconstitutional.

As to the first, when we consider how the passions of parties contending for what they conscientiously and dearly prize, are apt to be inflamed, and how, with inflamed passions, men must needs make false estimates of their reciprocal positions, and unreasonable demands each upon the patience and liberality of their opponents, it is not difficult to understand the displeasure of those who say, "Let the opponents of the judgment in the Gorham Case either be contented with the liberty still allowed to them as well as to their antagonists; or let them leave the Church, in which, with 'consciences set upon hair-triggers,' they are disturbers of the public peace on behalf of their own private opinions."

But let these persons be calmly prayed to recollect, that there is in the conviction of their brethren, to whom they thus appeal, a certain body of revealed truth given by God to man, and defined in an intelligible manner for his use, which it is not only the specific office but the divine commission of the Church to teach, and to which the doctrine of baptismal grace belongs. Now, *if* these things be true, then to propose that the faith and its opposite in any particular article shall be placed on equal terms within the precinct and by the law of the Church, is simply to demand that she shall betray her office. It is precisely—however startling the comparison may appear—what it would be, relatively to the marriage state, to enact that fidelity might be maintained in it, but that adultery might also be practised at the option of the parties. It is a process to which if the early Church of Christ would have submitted, she never need have seen her children mangled in the jaws of lions, or writhing on the stake or in the flame. But then it is also a process which would have turned the dwelling-place of the living God into a Pantheon: it is therefore that which simply could not be; because it is contrary to the words which His hand had graven

upon the Rock with a pen of iron—"The gates of hell shall not prevail against it."

The question, whether those things be true, is one of Christian doctrine, not to be argued here. The world may not respect it as the belief of Christendom ; but they surely will respect it as the private persuasion of free men, held under the charter of British liberty, and in conformity, as those men are convinced and ready to maintain, with all British history and law, down to our own day.

It would therefore be vain to ask of them to do that which, as will be seen, is at utter variance with their own fundamental principles.

They who view the Church as a voluntary association of men for the purposes of what they think to be the Christian religion, may well, for the sake of peace, be minded, under supposable circumstances, to quit it, and to form another such voluntary association, as they would take a new house, or choose a new coat when they might think fit so to do.

But they who regard a given body, called the Establishment, as being likewise the Church, and as therefore charged with the care and nurture of their souls, cannot go out of her, until she denies the Faith, and ceases to be the Church, so that they must seek the Church elsewhere.

With them, I apprehend, it never can be a matter of option or policy whether to leave the Church, as established by law, or not. Whatever permits them, will likewise drive them to depart. Whatever permits them, will likewise bind them to remain.

It seems therefore not unfair, that they should ask that the matter may in some way be brought to a defined issue ; and that the Church, if not in a perfectly free assemblage of all her orders, yet at all events by the mouth of her bishops, may be allowed to say what is her own doctrine.

It is not for the love of strife that they ask it ; but it is for the love of peace : for the love of truth certainly, but of peace also. These two great impulses will be found entirely accordant in a case like this, so soon as the Church shall have spoken : if she spoke that which they will not contemplate or name, truth would oblige them to depart in peace ; but on the other hand, as long as she is prevented from speaking, there can be no peace with those

who would so prevent her, and who would leave them only these two alternatives, to remain in the Church with doubt as to her faithfulness, or to quit it with doubt as to her treason : and so to have a safe conscience neither way.

This would be a mode of conduct going far beyond the licence of any social conflict ; a refinement of cruelty far surpassing the vulgar violence of physical torture ; an engine, too, of demoralisation in its working on individual consciences, such as, I should hope, it would be the recognised and common interest of us all to exclude.

And now is it unreasonable to say, that the law under which this Judgment has been given is contrary to the principles of the constitution ? These words have not been vaguely used. The great primordial charter of the Reformation declares, that the spirituality of England is the body properly qualified and entitled to administer the law spiritual of the land : as the temporality administers its law temporal. And this is the maxim on which, for many generations from the Reformation, our practice has actually been founded : the maxim which has been enunciated as indubitable by the greatest oracles of law ; the maxim which in substance, and with little other modification than the admission of the legal element in the persons of civilians, exclusively prevailed until times comparatively recent ; the maxim which, even for causes only in name ecclesiastical, predominated in the constitution of the Court of Appeal until the time within our own recent memory, the time not yet reaching the term fixed for a title by prescription to the smallest morsel of property, when the Court of Delegates was abolished, and (one year later) the Judicial Committee of the Privy Council was erected.

Will it be said, all this movement, away from the statute of Henry VIII. and the maxim of Lord Coke, which is here called abuse, has really been progress and improvement ? Surely it has not the signs of either. It has grown up in the worst times, the worst for religion and morality ; and now that religious life is vigorous again, the materials of a strong resistance are in existence, and in vigour too. It came on in times, when indifference as to faith was spreading its deadly poison. Caring for none of those things, men did not bring heresy into question

before courts. Not bringing heresy into question, nor dealing with morals, it was no wonder that for the scarcely spiritual, scarcely ecclesiastical, causes, which were the common business of the Court of Appeal, they thought less and less of the spiritual element in its composition. But again. That composition offends against first principles. It takes away the function of advising the Crown upon matters of theology from those, who are conversant with it : and commits it to those, who are not. I speak here the language of the political sphere ; a theologian might have justly said, it takes the function from those who had both a divine and a human title to its exercise, and gives it to those who never had the first, have but just got the last, and have got it nobody knows how.

The transference, then, of these functions to the Court of Privy Council is not progress, but retrogression and decay. The maxim overthrown and disregarded is not one antiquated and unfit for these times, but one deeply founded in the nature of things, and in right human and Divine. It being such a maxim, justly may we say, that the statute which thus tramples it in the mire is an unconstitutional statute. It is a statute as truly unconstitutional as would be our investing the Executive Government with the right of taxation, or with the dispensing power ; as was one which, in the time of Henry VIII., gave to the royal proclamation the force of law ; or one which, in the time of Charles I., perpetuated the Long Parliament.

These great maxims, fixing the relations of the chief forces that govern the community, these maxims in which we see Reason planting the land-marks of history for man, are the *leges legum*, the *ὑψίστοις νόμοις* of the ancients—

ὦν Ὀλυμπος
πατὴρ μόρος, οὐδέ τι
θνατὰ φύσις ἀνέρων
ἔτεκεν.*

they are not impaired by change, but they convict and condemn change : drift away from them imperceptibly we may—it is our misfortune and our imperfection : but when a critical period has

* Cf. Tyr., 866.

arrived, and the facts of our position are disclosed, it only remains to do as has been done in all our great periods of legislative reform, solemnly to renew our covenant with the truth, and to hand on the sacred torch, when it has been rekindled by our care, to the generation that is succeeding us in the eager race of life.

The only consideration that could justify the Church's acquiescence even for a time in the continuance of such a state of things as that established by the Acts of 1832 and 1833 in their joint effect, was, that it should have worked well : that is, that the temporal judges, most indecently intrusted with the construction and application of laws strictly spiritual, should have cured by their own discretion, and that of such ecclesiastical advisers as the Crown might assign to them within the terms of the Act, the monstrous solecism of their appointment, and should have either affirmed the judgment of the Church Court below, or at any rate if points of law, properly so called, required them to depart from it, should have not departed also from the Faith, or undermined its obligatory power. But it has been ordered otherwise ; and, under the express sanction of the two English Archbishops, the Committee has reported to the Crown with the effect, as it appears, in the judgment of high spiritual authorities, of wholly cancelling the obligation to teach within the Church of England that article of the Christian Faith which declares the remission of sins by the Sacrament of Baptism.

It undoubtedly *allows* that article of faith still to be taught ; an apology which is vauntingly put forward, and can only be received in profound sorrow, because, as an index of the state of mind from which it proceeds, it has a mournful and a deeply ominous significance. It reminds one to ask the question, why was the Gospel the object of persecution in early times ? Was it because of the bigotry and exclusiveness of the statesmanship of the day, or of the mythology to which it gave its countenance ? No ; but because of its own exclusiveness. That which is the truth teaches the doctrine of love to all persons ; but by virtue of that love it teaches also to hate the errors which mislead, and the delusions which blind them. The truth therefore is necessarily exclusive of its opposite ; and to propose a peace between them is simply a dis-

guised mode of proposing to truth suicide, and obtaining for falsehood victory. For truth itself, when not held as truth, but as a mere prize in the lottery of opinions, loses its virtue ; that, namely, of uniting us to its fountain ; since it is not by any mere abstractions, whether false or true, that we are to be healed, but by being placed in vital union, through the joint medium of His truth and His grace, with the Source of healing.

Yet it is devoutly to be hoped that the Church, while she must ask for all that is needful for the vindication of her faith, and must support the petition by the tender, if necessary, of all her worldly goods as a price for that Pearl of which she is but the setting, should demand no more ; and should rule upon the side of peace, obedience, and acquiescence, every doubt that does not reach to the very charter of her being.

That which she is entitled in the spirit of the constitution to demand, would be, that the Queen's ecclesiastical laws shall be administered by the Queen's ecclesiastical judges, of whom the Bishops are the chief ; and this too under the checks which the sitting of a body, appointed for ecclesiastical legislation, would impose.

But if it is not of vital necessity that a Church legislature should sit at the present time ; if it is not of vital necessity that all causes termed ecclesiastical should be treated under special safeguards—if it is not of vital necessity that the function of judgment should be taken out of the hands of the existing court—let the Church frankly and at once subscribe to every one of these great concessions, and reduce her demands to a *minimum* at the outset.

Laws ecclesiastical by ecclesiastical judges, let this be her principle ; it plants her on the ground of ancient times, of the Reformation, of our continuous history, of reason and of right. The utmost moderation in the application of the principle, let this be her temper, and then her case will be strong in the face of God and man, and, come what may, she will conquer.

The form of the petition as it has now been framed by the wisdom, and sustained by the consenting voice, of the Bishops, is that before us in the Bill lately on the table of the House of Lords : it is a petition that the Judicial Committee shall remain unaltered in

its composition; that it shall still be the single organ for the decision of ecclesiastical and spiritual causes; but that, judging for itself, and subject only to the ordinary forms of prohibition in case of excess, what matter is matter of mere law, and what of doctrine, it shall refer all points of doctrine when they arise to the Bishops of England and Wales for their report, which when obtained shall be final. Thus much I should have hoped, before the vote of the 3rd of June, was plain: that the State could not feel aggrieved; that the Church would by this measure come far short of securing all that the Reformation gave or left to her, even in this point in which it was supposed least liberal to her interests and honour; and that practically, having no power of her own to say by law on her behalf what matters were matters of doctrine, her whole security against encroachment, under such a law, must depend on the justice and moderation of the judicial tribunals of the country.

She would still in fact have her causes decided by the civil tribunals; a dangerous case, it must be owned, in times like these, when the temper of the State as such, by an inevitable necessity, becomes less and less congenial to the spirit of her supreme law that changes not. We must not conceal from ourselves that a great influence would be placed in the hands of those who would preside over the general conduct of the cause, would determine what issues should be referred and in what form of words, would shape every question under the influence of a spirit the least favourable to definite belief, that is, to dogma; and would ask again and again, until they had got the answer nearest their views of which the case admitted. If the amendment, suggested by Lord Stanley, were embodied in the measure, the power of the Judicial Committee would remain precisely as it is; but for one I should attach so much moral weight to the deliberate judgment of the Bishops, that I should greatly scruple to refuse the Bill with that amendment.

But it would be a gain that these decisions should come from a court avowedly civil rather than from one pseudo-ecclesiastical.

It would be another gain that this civil court should by law be bound to refer questions of doctrine to the episcopal body, which

again might very properly be bound to treat them in the manner most formal and best calculated to ensure deliberate and judicial answers to those references.

Whatever may be thought of the influence of the majority of the House of Commons over episcopal appointments, and of the prospects of the Church in connection with its exercise hereafter, every such churchman as I have described, who is also a loyal subject, should feel, that if the collective and judicial voice of the Bishops should deliberately utter as matter of doctrine what he individually believes to be contrary to the Catholic Faith, he could hardly claim to carry on a contest with them, as a member of the Church established by law.

It appears then as if this plan, or some such plan as this, represented the extremest point up to which the love of peace, the principle of civil obedience, and a desire to avoid endangering the institutions of the country, might under the circumstances properly carry the concessions of the Church, in the hope of thereby satisfying even the extremest jealousy that the State can feel towards her.

And what would be asked of the State? What would that be which it would have to concede? It would have to do for that, which it acknowledges as the branch of the Catholic Church established in England, what it is continually doing for the humblest of its subjects, associated or not, namely, redressing proved grievances, which have arisen from oversight or otherwise.

But in redressing this grievance, it would make no special or exceptional recognition of the authority of the Church. It would act upon the analogy of law, sustained and required by common sense, under which it is already the established practice of the courts to waive all pretensions to universal knowledge—to refer questions of law from a court of equity to a court of common law—questions of fact to a jury; and so in the courts of common law, to refer for foreign law to the authority of those who know and teach it; and in particular branches of jurisprudence, as, for example, mercantile or medical, to treat the points which belong to each especial branch of technical knowledge as issues of fact. On this principle it is now proposed to take, with respect to doctrine, the verdict of the Bishops of England and Wales.

If, my Lord, it be felt by the rulers of the Church that a scheme like this will meet sufficiently the necessities of her case, it must be no small additional comfort to them to feel that their demand is every way within the spirit of the Constitution, and short of the terms which the great compact of the Reformation would authorise you to seek. You, and not those who are against you, will take your stand with Coke and Blackstone ; you, and not they, will wield the weapons of constitutional principle and law ; you, and not they, will be entitled to claim the honour of securing the peace of the State no less than the faith of the Church ; you, and not they, will justly point the admonitory finger to those remarkable words of the Institutes :—

“ And certain it is, that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts and the ecclesiastical judges have kept themselves within their proper jurisdiction, without encroaching or usurping one upon another ; and where such encroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience.” *

Because none can resist the principle of your proposal, who admit that the Church has a sphere of proper jurisdiction at all, or any duty beyond that of taking the rule of her doctrine and her practice from the lips of ministers or Parliaments.

If it shall be deliberately refused to adopt a proposition so moderate, so guarded and restrained in the particular instance, and so sustained by history, by analogy, and by common reason, in the case of the Faith of the Church, and if no preferable measure be substituted, it can only be in consequence of a latent intention that the voice of the civil power should henceforward be supreme in the determination of Christian doctrine.

It is melancholy, it is full not only of sadness but of shame, to hear men protesting against being bound by a doctrinal report from the Bishops of the Church, who are also and at the same time protesting against objections to a doctrinal report from gentlemen bred in Westminster Hall. Every member of the community, it seems, is on the whole fit for his office, except those whose especial

* Coke, Inst., vol. vi. part iv. ch. 74.

privilege it is that they, more clearly than any other class, act under the direct transmission of a Divine authority.

I find it no part of my duty, my Lord, to idolise the Bishops of England and Wales, or to place my conscience in their keeping; I do not presume or dare to speculate upon their particular decisions; but I say that acting jointly, publicly, solemnly, responsibly, they are the best and most natural organ of the judicial office of the Church in matters of heresy, and according to reason, history, and the Constitution, in that subject matter the fittest and safest counsellors of the Crown. I am not ashamed to express the deep alarm with which I regard the consequences of such rejection as I have described, because some of those, among whom the evil would most powerfully operate, are not the pertinacious grasshoppers chattering in the sun, but the goodly cattle silent in the shade.

I do not speak of the recent vote as constituting the case I have in view, but even that rejection is no inconsiderable step taken towards a disastrous rupture.

We should, indeed, have a consolation, the greatest perhaps which times of heavy trouble and affliction can afford, in the reduction of the whole matter to a short, clear, and simple issue; because such a resolution, when once made unequivocally clear by acts, would sum up the whole case before the Church to the effect of these words: "You have our decision; take your own; choose between the mess of pottage, and the birthright of the bride of Christ."

Those that are awake might hardly require a voice of such appalling clearness; those that sleep, it surely would awaken; of those that would not hear, it must be said, "Neither would they hear, though one arose from the dead."

But She that, a stranger and a pilgrim in this world, is wedded to the Lord, and lives only in the hope of His coming, would know her part; and while going forth to her work with steady step and bounding heart, would look back with deep compassion upon the region she had quitted—upon the slumbering millions, no less blind to the Future, than ungrateful to the Past.

And yet, my Lord, I must venture on one word more before I close.

The name of the Count de Maistre has become one of European

celebrity. He is one of the writers who have had the very largest share in shaping the modern tendencies of the devout and energetic portion of the Roman Catholics of Western Europe. He is, unhappily, of the "most straitest sect" of that church—of that ultramontane school which has been from its first origin alike needful and dangerous to the Roman system; and he has defined its principles with even an augmented sharpness, and wound them up to a higher intensity than they had before attained.

Yet listen to the words in which he writes of the Church of England:—

"Si jamais les Chrétiens se rapprochent, comme tout les y invite, il semble que la motion doit partir de l'Eglise d'Angleterre. Le presbytérianisme fut une œuvre Française, et par conséquent une œuvre exagérée. Nous sommes trop éloignés des sectateurs d'un culte trop peu substantiel : il n'y a pas moyen de nous entendre, mais l'Eglise Anglicane, qui nous touche d'une main, touche de l'autre ceux que nous ne pouvons toucher ; et quoique, sous un certain point de vue, elle soit en butte aux coups des deux partis, et qu'elle présente le spectacle un peu ridicule d'un révolté qui prêche l'obéissance, cependant elle est très précieuse sous d'autres aspects, et peut-être considérée comme un de ces intermèdes chiniques, capable de rapprocher des élémens insociables de leur nature." *

It is nearly sixty years since thus a stranger and an alien, a stickler to the extremest point for the prerogatives of his Church, and nursed in every prepossession against ours, nevertheless turning his eye across the Channel, though he could then only see her in the lethargy of her organisation, and the dull twilight of her learning, could nevertheless discern that there was a special work written of God for her in heaven, and that she was VERY PRECIOUS to the Christian world. Oh ! how serious a rebuke to those who, not strangers, but suckled at her breast, not two generations back, but the witnesses now of her true and deep repentance, and of her reviving zeal and love, yet (under whatever provocation) have written concerning her even as men might write that were hired to make a case against her, and by an adverse instinct in the

* Considérations sur la France, chap. ii.

selection of evidence, and a severity of construction, such as no history of the deeds of man can bear, have often, too often in these last years put her to open shame ! But what a word of hope and encouragement to every one who, as convinced in his heart of the glory of her providential mission, shall unshrinkingly devote himself to defending within her borders the full and whole doctrine of the Cross, with that mystic symbol now as ever gleaming down on him from heaven, now as ever showing forth its inscription ; *in hoc signo vinces.*

I remain, my Lord Bishop, with dutiful respect,

Your most faithful Servant,

W. E. GLADSTONE.

London, June 4, 1850.

